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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

April 16, 2015

10:04 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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Doc# 7092 Adjourned Hearing RE: Motion for Omnibus Objection to  
Claim(s) / ResCap Liquidating Trusts Sixty-Eighth Omnibus  
Objection to Claims.

(CC: Doc# 7188) Adjourned Hearing RE: Motion for Omnibus  
Objection to Claim(s) / ResCap Borrower Claims Trusts Sixty-  
Ninth Omnibus Objection to Claims (No Liability Borrower  
Claims). Hearing Going Forward solely as to claim Filed by  
Maurice Sharpe.

(CC: Doc# 8042) Adjourned Hearing RE: ResCap Borrower Claims  
Trusts Eighty-Second Omnibus Objection to Claims (No Liability  
Borrower Claims). Hearing going forward regarding the claim(s)  
of Kenneth Dlin.

(CC: Doc# 8237) Motion for Objection to Claim(s) Number: 112,  
114, 415, 417.

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(CC: Doc# 8019, 8114) Evidentiary Hearing RE: Motion for  
Objection to Claim(s) Number: 61 (Claim of Francine Silver).

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ERLINDA ANIEL - Pro per  
DEANNA HORST - ResCap Liquidating Trust  
KATHY PRIORE - ResCap Liquidating Trust

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 P R O C E E D I N G S

2 THE COURT: All right. Please be seated. We're here  
3 in Residential Capital, number 12-12020.

4 Mr. Wishnew.

5 MR. WISHNEW: Good morning, Your Honor. Jordan  
6 Wishnew of Morrison and Foerster for the ResCap Liquidating  
7 Trust.

8 Your Honor, the first matter going forward on today's  
9 agenda is item number 1 under Roman numeral III, the ResCap  
10 Liquidating Trust Sixty-Eighth Omnibus Objection to Claims.

11 THE COURT: What page is that on?

12 MR. WISHNEW: That is on page 8, Your Honor.

13 THE COURT: Okay.

14 MR. WISHNEW: Thank you, Your Honor.

15 This uncontested claims objection was filed and  
16 documented at Doc #7092. By the claims objection, the  
17 liquidating trust seeks to disallow and expunge 113 proofs of  
18 claim filed by the debtors' former officers, employees, and  
19 directors, each of whom is a beneficiary of the third-party  
20 release provided for in the plan and confirmation order. Each  
21 claimant voluntarily waived their indemnification claims  
22 against the debtors in consideration for the third-party  
23 release under the terms of the plan and confirmation order.

24 In support of their objection, the liquidating trust  
25 submitted the declaration of Ms. Deanna Horst who is in the

1 court today and available to answer any questions the Court  
2 might have. The objection was served on all claimants, and to  
3 date, no responses from any creditor, identified on Exhibit A  
4 to the objection, have been received.

5 For the reasons set forth in the objection, Your  
6 Honor, the liquidating trust -- the liquidating trust would  
7 respectfully request the Court enter the proposed form of  
8 order, docketed at 7092.

9 THE COURT: So none of the claimants filed a response,  
10 but AFI did.

11 MR. WISHNEW: Yes, Your Honor.

12 THE COURT: Is anybody here for AFI?

13 MR. HOPKINS: Good morning, Your Honor.

14 THE COURT: Come on up.

15 MR. HOPKINS: Good morning, Your Honor. Christopher  
16 Hopkins from Weil Gotshal & Manges for AFI and its nondebtor  
17 subsidiaries and affiliates.

18 THE COURT: What gives AFI standing to file anything  
19 with respect to this claim objection?

20 MR. HOPKINS: Your Honor, we filed this claim  
21 objection solely to clarify what AFI believed to be certain  
22 matters for the record and to -- just to make sure the Court  
23 was aware of the ongoing investigation by the DOJ.

24 THE COURT: The issues raised by this objection, is  
25 there a pecuniary interest that AFI has?



1 MR. HOPKINS: Well, one of the statements made in the  
2 objection relates to the indemnification claimants'  
3 indemnification rights against Ally, and what we wanted to  
4 clarify was just AFI does not believe that under the plan it  
5 provided affirmative indemnification rights to each and every  
6 indemnification claimant that we just wanted to clarify --

7 THE COURT: But that's not before me today, right?

8 MR. HOPKINS: Correct.

9 THE COURT: Okay.

10 MR. HOPKINS: Right.

11 THE COURT: But you -- I'm not saying I'm ready to  
12 sustain the objection. I just want to understand that AFI has  
13 no direct pecuniary interest in these indemnification claims  
14 asserted against the debtors or the outcome of the trust's  
15 objection; is that correct?

16 MR. HOPKINS: That's correct.

17 THE COURT: Okay. Why don't you have to seat, but I  
18 may still have some more questions for you.

19 MR. HOPKINS: Okay.

20 THE COURT: Here's what I want you to walk me through,  
21 Mr. Wishnew.

22 MR. WISHNEW: Sure, Your Honor.

23 THE COURT: The AFI statement indicates that I guess  
24 it's the U.S. Attorney's Office in Los Angeles is -- continues  
25 to conduct an investigation about potential violations of

1 FIRREA.

2 MR. WISHNEW: Correct, Your Honor.

3 THE COURT: And you don't dispute that.

4 MR. WISHNEW: No.

5 THE COURT: Okay. And the plan doesn't discharge,  
6 bar, enjoin FIRREA claims against officers, directors or  
7 employees; is that correct?

8 MR. WISHNEW: That's correct, Your Honor.

9 THE COURT: Those were -- it was expressly not  
10 necessarily FIRREA, but it was expressly carved out  
11 governmental claims against individuals.

12 MR. WISHNEW: It was part of the limited carve-out,  
13 and I believe it's section IX(E) of the claim, Your Honor.

14 THE COURT: And the thirty-party releases that the  
15 plan provides for the benefit of officers, directors, employees  
16 doesn't serve to bar any DOJ claims under FIRREA against the  
17 individuals, correct?

18 MR. WISHNEW: Against the individuals, correct, Your  
19 Honor, yes.

20 THE COURT: Does the -- what language in the plan bars  
21 indemnification claims by officers, directors or employees for  
22 any liability -- I'm going to include within that defense  
23 clause "et cetera" -- that they may incur in defending or  
24 responding to DOJ claims under FIRREA?

25 MR. WISHNEW: It would be the general injunction

1 provision, Your Honor, because it would be a continuation of a  
2 pre-petition claim which they've voluntarily waived at this  
3 point.

4 THE COURT: Point me to the -- in other words,  
5 I'm -- because -- I certainly understand -- I think I  
6 understand that with respect to -- the plan included third-  
7 party releases. I've already had some -- written a bunch of  
8 opinions insofar as  
9 AFI as a beneficiary of the third-party release, what the  
10 impact of that is, okay. So if a borrower asserted a claim  
11 against an officer or director arising out of their employment  
12 with ResCap, one of the ResCap entities, the third-party  
13 release would apply. You would argue that, correct? And what  
14 precluded in the flip side of that is the officer, director or  
15 employee released any claim that it might have against the  
16 debtors, that makes perfect sense because you got an injunction  
17 in their favor that third-party claims can't proceed.

18 Now we're dealing with a situation where potential DOJ  
19 claims are not barred against the individuals. And point me to  
20 the precise language in the plan that would nevertheless  
21 release, bar, discharge any indemnification claims that the  
22 officers, directors or employees would have in connection with  
23 responding to DOJ FIRREA claims.

24 MR. WISHNEW: So, Your Honor, it would defer to -- one  
25 moment. So you have the plan injunction, Your Honor, which

1 provides --

2 THE COURT: What paragraph are you reading from?

3 MR. WISHNEW: That is Article IX(i).

4 THE COURT: Okay, go ahead.

5 MR. WISHNEW: It says, "All entities who have held or  
6 may hold claims that constitute release claims are permanently  
7 enjoined or precluded from the entity effective date" --

8 THE COURT: Just a little slower, okay?

9 MR. WISHNEW: Sure. "All entities who have held or  
10 may hold claims, equity interest, causes of action or  
11 liabilities that constitute release claims are permanently  
12 enjoined or precluded from and after the effective date from  
13 commencing or continuing in any matter any other proceeding of  
14 any kind against any released party either directly,  
15 derivatively or otherwise on account of or in connection with  
16 any of the released claims."

17 THE COURT: Okay. So what's a released claim?

18 MR. WISHNEW: Well, the released claim is in turn  
19 defined to include liabilities that --

20 THE COURT: What paragraph are you looking at now?

21 MR. WISHNEW: So "released claim" is defined by plan  
22 Article I(A) subpart(242), to include liabilities that have  
23 been released pursuant to the plan or subject to exculpation  
24 pursuant to the plan.

25 THE COURT: That doesn't help me a lot.

1 MR. WISHNEW: I mean, I would also add, Your Honor,  
2 that to the extent that there's any inconsistency between the  
3 plan and the confirmation order, the confirmation order does  
4 govern, and in regards to finding of fact, conclusion of law QQ  
5 in the confirmation order, it specifically contemplates the  
6 affirmative waiver by these claimants of their claims against  
7 the debtors.

8 THE COURT: Point me to the paragraph -- none of them  
9 filed an objection nor response to your objection, and I'm  
10 certainly mindful of that, but as in all instances, I don't  
11 sustain objections unless the objection has set forth a prima  
12 facie basis for the relief that you've requested.

13 MR. WISHNEW: Understood.

14 THE COURT: AFI, which I sort of consider a stranger  
15 to this specific objection, has filed this "statement". I  
16 think I would have had some of the same questions myself. I  
17 just want to be -- I need for you to walk me through -- and  
18 this is what I didn't see in the papers, in the objection,  
19 where you walk through and you point to Article I(A)(242) and  
20 what the effect of that is, and if that doesn't do it but you  
21 say the order -- the confirmation order does, fine. I want you  
22 to walk me through the precise language in the plan or the  
23 confirmation order that would have the effect of having the  
24 indemnification claimants release those claims even if they as  
25 individuals may remain subject to FIRREA liability to DOJ. I

1 mean, it's one thing to say that, well, we got them a third-  
2 party -- we got a third-party release so nobody can proceed  
3 against them as individuals and we dutifully enforce the  
4 release and therefore it makes perfect sense for them to  
5 release any indemnification claims against the debtor. That's  
6 one position. But here, we're dealing with a circumstance  
7 where the plan expressly carves out DOJ claims.

8 MR. WISHNEW: Um-hum.

9 THE COURT: But I'm focusing on FIRREA because they're  
10 just -- you acknowledge there's a FIRREA investigation that  
11 continues.

12 MR. WISHNEW: Um-hum.

13 THE COURT: What the result will be, I don't know.

14 MR. WISHNEW: Um-hum.

15 THE COURT: So the individuals are potentially  
16 exposed.

17 MR. WISHNEW: Agreed.

18 THE COURT: And I want to be satisfied that the plan  
19 or the confirmation order fairly read means that even though  
20 you're still potentially exposed you -- the plan provides that  
21 you have released, discharged your potential indemnification  
22 claims against the debtors.

23 MR. WISHNEW: To that point, Your Honor, let me  
24 cite -- or let me read into the record confirmation order  
25 paragraph QQ, and this is cited on page 10 of our objection.

1 "The individual officers and directors of Ally and its  
2 subsidiaries (including the debtors, directors, officers, and  
3 employees) covered by the defined term "third-party release"  
4 have also made a substantial contribution to the plan by giving  
5 up their rights to share in insurance that they would otherwise  
6 have access to defend themselves against such potential  
7 claims."

8           Goes on, "These parties will also forego their own  
9 claims for indemnity and contribution from the estates. By  
10 giving up their insurance contractual indemnity claims, the  
11 debtors, officers, and directors have provided substantial  
12 consideration to the debtors' estates."

13           Paragraph SS continues, "There is an identity of  
14 interest between the debtors and the beneficiaries of the  
15 third-party releases. The Ally released parties have the right  
16 to seek indemnity, contribution or other reimbursement from the  
17 debtors with respect to the debtors' activities. The third-  
18 party releases appropriately relieve the debtors from these  
19 potential expenses."

20           So it's our position, Your Honor, that those  
21 provisions, very unambiguously read, represent an affirmative  
22 and knowing waiver by these claimants of their indemnification  
23 rights against the debtors' estates, notwithstanding the fact  
24 that they did have limited liability on an individual basis  
25 arising from government investigations.

1 THE COURT: SS, read it to me one more time because  
2 it --

3 MR. WISHNEW: Sure.

4 THE COURT: That sounds like the situation where they  
5 benefit from the third-party basis (ph.) and in return for  
6 which they give up indemnification but --

7 MR. WISHNEW: I think the --

8 THE COURT: -- is it more broad. Read SS to me.

9 MR. WISHNEW: Sure. "There is an identity of interest  
10 between the debtors and the beneficiaries of the third-party  
11 releases. The Ally released parties" -- which is the defined  
12 term -- "have the right to seek indemnity, contribution or  
13 other reimbursement from the debtors with respect to the  
14 debtors' activities. The third-party releases appropriately  
15 relieve the debtors from these potential expenses."

16 THE COURT: How do the third-party releases release  
17 the debtors from the expenses for FIRREA claims that are not  
18 covered -- that are carved out in the plan.

19 MR. WISHNEW: So to the extent that the third-party  
20 release -- to extent the third-party release -- I guess the  
21 fact of the matter is, Your Honor, with the knowing waiver of  
22 claims by these individuals, they've essentially absolved the  
23 debtors' estates of responsibility that could arise from the  
24 FIRREA investigation. I believe in part that is why, charting  
25 back to the plan and Article IX(m), as in Mary, there is a



1 limited retention of the right to seek indemnity from Ally to  
2 the extent that that indemnity right is -- does exist in that  
3 claimant's favor.

4 THE COURT: So I'm looking at your ResCap Liquidating  
5 Trust's Sixty-Eighth Omnibus Objection to Claims, director,  
6 officer, and employee indemnification claims. It's in CF 7092.

7 So you quoted to me from confirmation order paragraph  
8 SS, and it's in your motion papers at page 10, paragraph 1-3.  
9 It says, "There is an identity of interest between the debtors  
10 and the beneficiaries of the third-party releases. The Ally  
11 released parties have the right to seek indemnity contribution  
12 or other reimbursement from the debtors with respect to  
13 debtors' activities. The third-party release is appropriate to  
14 relieve the debtors from these potential expenses."

15 So you agree that third-party releases don't relieve  
16 the debtors from potential expenses in connection with DOJ  
17 FIRREA claims?

18 I see Mr. Mannal rising. I don't know whether you  
19 want to confer with him or -- do you want to speak to me, Mr.  
20 Mannal?

21 MR. WISHNEW: I would say, Your Honor, the debtors'  
22 representatives are certainly beneficiaries of the third-party  
23 releases.

24 THE COURT: Third-party releases do absolutely no good  
25 with respect to DOJ FIRREA claims.

1 MR. WISHNEW: Understood.

2 THE COURT: Correct?

3 MR. WISHNEW: Agreed, Your Honor, yes. I would simply  
4 say to the extent that the debtors' estates are responsible in  
5 any way related to the FIRREA investigation, it's to the extent  
6 the DOJ has preserved that right through a proof of claim.

7 THE COURT: Have they?

8 MR. WISHNEW: I'm sorry?

9 THE COURT: Have they? Is there a DOJ proof of claim?

10 MR. WISHNEW: There is a DOJ proof of claim, Your  
11 Honor. It's the liquidating trust position they have not  
12 preserved their --

13 THE COURT: Mr. Mannal, do you want to be heard?

14 MR. MANNAL: Good morning, Your Honor. Doug Mannal on  
15 behalf of the liquidating trust.

16 Your Honor, just briefly, I think your first point was  
17 absolutely correct, and I just -- AFI does not have any  
18 standing to put in any objection or statement, however they  
19 phrase it and --

20 THE COURT: I think I would -- I had the  
21 same -- before I read the AFI statement, I had the same issues  
22 going through my mind, Mr. Mannal.

23 MR. MANNAL: And I agree that the plan is not as clear  
24 as it could have been on this issue. But I think the -- if you  
25 take a step back and look at what the confirmation order says

1 and what the agreements were and read the provisions together,  
2 I think it's relatively clear.

3 If you look at QQ, the finding, it talks about  
4 releasing -- the released parties releasing their claims  
5 against the insurance. And there's no suggestion that somehow  
6 they're releasing their claims against the insurance other than  
7 in connection with claims that the government may have under  
8 FIRREA.

And I think that's consistent with --

9 THE COURT: The insurance is gone. They can't look to  
10 insurance whether --

11 MR. MANNAL: Well, the insurance is gone as a result  
12 of the global settlement.

13 THE COURT: Yes, I understand.

14 MR. MANNAL: Right. And so what I'm suggesting is  
15 they -- there's no suggestion that somehow that insurance was  
16 preserved or what have you.

17 THE COURT: Oh, I'm clear that the insurance is gone.

18 MR. MANNAL: Right. And the same paragraph then talks  
19 about the fact that they would also forego their own claims for  
20 indemnity and contribution from the estates. What they're  
21 saying is, because I'm benefiting from the third-party release,  
22 whatever the third-party release provides it provides, but  
23 because I'm benefiting from it, I'm waiving my indemnity claims  
24 against the estates. But in paragraph M of that same article,  
25 the limitations, it makes clear, crystal clear, that any

1 indemnity rights held by the debtors' representatives against  
2 Ally arising from the claims are not released under this  
3 Article IX.

4 And so the deal was, Your Honor -- and just to be  
5 clear, and I agree that the language is not that crystal, but  
6 when read together, I think it makes sense. The deal was that  
7 the indemnity claims against the estate would be released but  
8 would be preserved against Ally with respect to things that  
9 were carved out of the third-party release.

10 THE COURT: Can somebody enlighten me whether -- do  
11 you know whether Ally has paid for defense costs for any former  
12 officers, directors, employees in connection with the DOJ  
13 FIRREA investigation?

14 MR. MANNAL: I don't know. I know the liquidating  
15 trust has not.

16 THE COURT: So what remains filed against the estate  
17 are unliquidated proofs of claim for indemnification, correct?

18 MR. WISHNEW: Yes, Your Honor.

19 THE COURT: Have any of the claimants, indemnification  
20 claimants, forwarded any evidence of defense costs or anything  
21 that they've incurred in connection with the FIRREA  
22 investigation?

23 MR. WISHNEW: No, Your Honor.

24 THE COURT: Mr. Hopkins, has Ally reimbursed any  
25 individual officers, directors or employees, present or former,

1 for costs of defense in connection with the DOJ FIRREA  
2 investigation?

3 MR. HOPKINS: Your Honor, I don't know at this time.  
4 We haven't -- we haven't --

5 THE COURT: Since you decided to put your two cents in  
6 with a statement, I would like a letter filed on the docket by  
7 tomorrow at 5 o'clock specifically responding to my question  
8 whether AFI or any of its affiliates have paid or reimbursed  
9 any present or former officers, directors or employees for any  
10 costs or expenses incurred in responding to a DOJ FIRREA  
11 investigation.

12 MR. HOPKINS: Thank you, Your Honor.

13 THE COURT: And if so -- well, let's leave it -- I'll  
14 leave it at that. I'll decide after I get your response  
15 whether I want more information or not.

16 Plan, Article IX(M) certainly contemplated that any  
17 indemnity rights held by the debtors' representatives against  
18 Ally arising from claims not released by this Article IX,  
19 that's preserved. And so I do want to know specifically, since  
20 you -- Ally -- AFI took it on itself to file a statement, even  
21 though it acknowledged it has no direct pecuniary interest,  
22 what the actual facts are.

23 You know, I suppose it's one thing, Mr. Wishnew, if I  
24 find that the plan language or confirmation order language is  
25 clear and resolves this -- I'm not ruling on it. If I were to

1 find that the plan or confirmation order language is clear and  
2 unambiguous and clearly calls for the relief you're asking for,  
3 I would certainly grant it. This is all abstract hypothetical  
4 because nobody's come forward, none of these indemnity  
5 claimants have come forward with a demand for reimbursement at  
6 this point. So even if I rule, it still leaves open 502(j) as  
7 a basis for coming back at some later point and hashing this  
8 out. I'm going to take this -- once I receive AFI's response,  
9 I'll decide whether I want to have a further hearing on it. If  
10 not, I will take it under advisement to see what to do with it.

11 MR. WISHNEW: Understood, Your Honor.

12 THE COURT: Okay. All right. Thanks.

13 MR. WISHNEW: Your Honor, the next matter on today's  
14 calendar is item 2 on page 9, the Borrower Claims Trust's  
15 Sixty-Ninth Omnibus Objection to Claims, solely as it relates  
16 to the claim of Maurice Sharpe. I'm going to turn the podium  
17 over to my colleague, Laurel Handley of Pite Duncan who will be  
18 arguing this on behalf of the Borrower Claims Trust. She has  
19 been admitted pro hac vice for this matter.

20 THE COURT: Okay. Just bear with me since I'm  
21 hunting.

22 MR. MANNAL: Your Honor, may we be excused?

23 THE COURT: Oh, absolutely, sure.

24 MR. MANNAL: Good seeing your.

25 THE COURT: Thanks.

1 Just give me a second, okay? Okay.

2 MS. HANDLEY: Good morning, Your Honor. My name is  
3 Laurel Handley. I'm with Pite --

4 THE COURT: Just tell me your last name again.

5 MS. HANDLEY: Handley, H-A-N-D-L-E-Y. I'm with Pite  
6 Duncan, and I'm here representing the ResCap Borrower Claims  
7 Trust with regard to the sixty-ninth omnibus objection as it  
8 relates to the claim of Maurice Sharp

9 MR. LEWIS: Good morning, Your Honor. Kenneth Lewis,  
10 Lewis Law, PLLC, local counsel to Mr. Sharpe. On the phone is  
11 Mr. David Winterton who is Nevada counsel to Mr. Sharpe.

12 THE COURT: Thank you. Who's going to argue?

13 MR. LEWIS: I am, Your Honor.

14 THE COURT: Okay, Mr. Lewis. Thank you.

15 Go ahead, Ms. Handley.

16 MS. HANDLEY: Thank you, Your Honor.

17 Through the objection, the borrower trust seeks to  
18 expunge the claim of Mr. Sharpe, and it's appropriate to do so  
19 because the validity of Mr. Sharpe's claim can be determined as  
20 a matter of law. There are no factual issues that need to be  
21 resolved with regard to the underlying Nevada state court  
22 litigation. The only issues relate to Nevada law.

23 Specifically, Mr. Sharpe has one claim remaining in  
24 his Nevada state court litigation, that's a claim for wrongful  
25 foreclosure. However, the cause of action is not supported by

1 Nevada law. In Nevada, wrongful foreclosure is a very specific  
2 claim. The Nevada Supreme Court has laid out the required  
3 elements to seek a wrongful-foreclosure claim.

4 THE COURT: And what case are you referring to?

5 MS. HANDLEY: It's Collins v. Union Federal Savings  
6 and Loan Association. The citation to the Pacific Reporter is  
7 662 P.2nd 610. It's a Supreme Court decision from 1983. And  
8 the Nevada Supreme Court has clearly stated that action from  
9 the tort of wrongful foreclosure will lie if the borrower  
10 establishes that they were not in default at the time of the  
11 foreclosure.

12 THE COURT: There's the nub.

13 MS. HANDLEY: Yes, there --

14 THE COURT: There is the nub, because doesn't this  
15 turn on whether there is an enforceable note against Sharpe?

16 MS. HANDLEY: That's what Mr. Sharpe is seeking to  
17 expand the wrongful-foreclosure claim to --

18 THE COURT: Why does that expand the -- I --

19 MS. HANDLEY: Well, all of the cases that deal with  
20 wrongful foreclosure presume the validity of the underlying  
21 loan.

22 THE COURT: Show me one case from Nevada or elsewhere  
23 that deals with an allegedly forged note.

24 MS. HANDLEY: There is none.

25 THE COURT: Oh, so it's so clear --



1 MS. HANDLEY: For a wrongful-foreclosure claim.

2 THE COURT: You're saying it's so clear under Nevada  
3 law but you can't cite a single case that deals with an alleged  
4 forged note?

5 MS. HANDLEY: There is, not in the wrongful  
6 foreclosure context. There are cases that deal with forged  
7 notes where the borrower seeks to quiet title or they seek  
8 slander of title as Mr. Sharpe did in this case, or they seek  
9 to invalidate the note and deed of trust. Those causes of  
10 action are separate causes of action. And the wrongful  
11 foreclosure case law doesn't deal with those separate  
12 underlying claims --

13 THE COURT: Doesn't --

14 MS. HANDLEY: -- challenging the validity of the deed  
15 of trust.

16 THE COURT: -- a wrongful-foreclosure claim depend  
17 upon the existence of an enforceable note?

18 MS. HANDLEY: The Nevada case law doesn't make that  
19 distinction. I understand your point.

20 THE COURT: Oh, it doesn't. You haven't cited a  
21 single -- nobody's cited a case --

22 MS. HANDLEY: No.

23 THE COURT: -- that deals with it. But isn't it  
24 obvious? How can you -- let me ask you a hypothetical. If  
25 GMACM knew to a certainty that the note was a forgery, could it

1 have proceeded with foreclosure?

2 MS. HANDLEY: If it knew for a certainty --

3 THE COURT: Yes.

4 MS. HANDLEY: -- if there had been an adjudication,  
5 likely not, but there --

6 THE COURT: No, no, no, no. Don't add facts to my  
7 hypothetical, okay. They know to a certainty that the note is  
8 a forgery, may they proceed to foreclosure on the note -- on  
9 the mortgage? Yes or no?

10 MS. HANDLEY: Likely not, but that's not a wrongful --

11 THE COURT: I'm sorry. Say that again.

12 MS. HANDLEY: No, but I don't think that's a wrongful-  
13 foreclosure claim. That's a claim for negligence or slander of  
14 title or quiet title.

15 THE COURT: Well, why? Why isn't that a  
16 wrongful -- you're telling me it is not wrongful foreclosure in  
17 the hypothetical that I posit if a loan servicer knows to a  
18 certainty that a note is a forgery, it's not wrongful  
19 foreclosure for them to foreclose on the mortgage?

20 MS. HANDLEY: I don't think that under Nevada law it  
21 supports that particular cause of action.

22 THE COURT: Give me a case that says that.

23 MS. HANDLEY: There isn't one.

24 THE COURT: Give me a case that says it.

25 MS. HANDLEY: There isn't one, and there isn't a case

1 that says that does support a claim for wrongful foreclosure.  
2 There are cases that subject it supports other claims, and Mr.  
3 Sharpe did pursue those other claims which were resolved, which  
4 is --

5 THE COURT: I can't figure out how anybody -- were you  
6 the counsel for GMAC when this was resolved?

7 MS. HANDLEY: My law firm was, yes. The --

8 THE COURT: How anybody could have -- let me stop.  
9 The resolution through mediation expressly carved out the  
10 wrongful-foreclosure claim, correct?

11 MS. HANDLEY: Correct.

12 THE COURT: And yet you're standing here today and  
13 telling me that where a settlement was reached and expressly  
14 carved out wrongful foreclosure, that Mr. Sharpe is precluded  
15 from proceeding with a wrongful-foreclosure claim?

16 MS. HANDLEY: Correct, based on claim preclusion and  
17 also because the wrongful-foreclosure claim that he attempted  
18 to carve out is not supported by Nevada law. Yes, he did try  
19 to carve out that cause of action, but the underlying facts  
20 supporting that cause of action were resolved through his other  
21 claims for fraud --

22 THE COURT: Well, you say that, but show me an agreed  
23 set of facts. Show me a settlement agreement that resolves  
24 those facts upon which he seeks to proceed with his wrongful-  
25 foreclosure claim. None exist to my knowledge.

1 MS. HANDLEY: There is no settlement agreement or  
2 findings of fact that resolve those issues of fact, correct,  
3 but --

4 THE COURT: And you say that in the absence of a  
5 settlement agreement or an agreed statement of facts that  
6 preclusion principles apply and prevent him from proceeding  
7 with the cause of action that was expressly carved out from the  
8 settlement.

9 MS. HANDLEY: Correct, because there were four other  
10 causes of action that were basically a reiteration of his  
11 wrongful-foreclosure claim, or I should say the wrongful-  
12 foreclosure claim is a reiteration of those other claims for  
13 fraud and quiet title which were alleged in his original  
14 claimant. Those two causes of action were expressly dismissed  
15 when he filed his amended complaint seeking negligence and  
16 slander of title. And in the negligence and slander of title  
17 causes of action, Mr. Sharpe specifically alleges that GMAC  
18 knew of the fraudulent nature of the underlying loan and  
19 proceeded to foreclosure anyway.

20 THE COURT: Yes, he alleges that, that's right.

21 MS. HANDLEY: Right. So those are the claims that  
22 were previously resolved and dismissed or are subject to  
23 dismissal.

24 THE COURT: Well, that seems to be a major part of the  
25 dispute is -- look, if a lawyer in your firm hadn't agreed to a

1 settlement that expressly carved out wrongful foreclosure, you  
2 might have a better argument.

3 MS. HANDLEY: The settlement was between Fidelity  
4 National Title and Mr. Sharpe. At that point, Fidelity  
5 National Title was indemnifying GMAC as to those causes of  
6 action and resolved the claims on behalf of GMAC.

7 THE COURT: Let me ask this. At the time of the  
8 foreclosure, who owned the note?

9 MS. HANDLEY: GMAC was is servicer for the loan.

10 THE COURT: I know. I asked who owned the note.

11 MS. HANDLEY: I don't have that information off the  
12 top of my head. I believe at the foreclosure sale the entity  
13 that took title was Federal National Mortgage Association,  
14 Fannie Ma. They were likely the investor at the time.

15 THE COURT: Did GMAC have contractual indemnity from  
16 Fannie Mae in connection with proceeding with the foreclosure?

17 MS. HANDLEY: Not that I'm aware.

18 THE COURT: Do you know? I mean, do you know -- can  
19 you represent affirmatively that there's nothing in a contract  
20 with the loan servicer as to what rights of indemnity it  
21 receives?

22 MS. HANDLEY: It would be --

23 THE COURT: It doesn't -- it's not foreclosing on its  
24 own behalf.

25 MS. HANDLEY: Right.

1 THE COURT: It's foreclosing on behalf of whatever the  
2 entity was that owned the note.

3 MS. HANDLEY: Right. Is servicing guide would cover  
4 or govern the relationship. There's not a contract between  
5 GMAC on Fannie Mae when it services the loans. There's a  
6 servicing guide, and I think the servicing guide would require  
7 if there was some inappropriate action on behalf -- on the part  
8 of the servicer that they would repurchase the loan from Fannie  
9 Mae. I don't think there would be any indemnity claim on  
10 behalf of Fannie Mae. They would simply require the servicer  
11 repurchase the loan. But there has been no such claim for  
12 repurchase in this case. I believe Fannie Mae has already sold  
13 the property to unrelated third parties.

14 And with regard to the carve-out, there is a  
15 case -- actually a case that Mr. Sharpe cited that addresses  
16 the carve-out and actually makes clear in that case a party  
17 attempted to carve out their right to defend against a  
18 complaint that was brought by a plumbing company that installed  
19 plumbing in a hotel. The defendant filed a cross-complaint and  
20 resolved that cross-complaint. They settled with regard to the  
21 cross-complaint, dismissed the cross-complaint and reserved  
22 their right to defend against the allegation in the underlying  
23 complaint. The court in that case -- and it's Alpha Mechanical  
24 Heating and Air Conditioning v. Travelers. The citation is 35  
25 Cal.Rptr.3d 496. In that case, the court held that the carve-

1 out attempted by the defendant was ineffective because it  
2 didn't specify exactly what claims or defenses it could pursue  
3 with regard to the complaint. And the court actually noted  
4 that the parties in these circumstances should be extremely  
5 cautious about settling a part or piece of their litigation,  
6 they must take great care to preserve key claims or defenses or  
7 risk losing them.

8 THE COURT: It was very crystal clear they preserved  
9 the claim for wrongful foreclosure.

10 MS. HANDLEY: But Mr. Sharpe did not preserve his  
11 claim that the note and deed of trust was invalid. And that's  
12 what underlies his wrongful-foreclosure claim. The  
13 allegation --

14 THE COURT: Well, you say he didn't --

15 MS. HANDLEY: -- that the note and deed of trust --

16 THE COURT: -- and his counsel say that he did. To  
17 the extent that it would have to be established in any  
18 foreclosure action that there was a valid note, he's saying  
19 that's preserved.

20 Look, if you had gotten a written order signed by the  
21 court, which you don't have, you're trying to apply preclusion  
22 to some document in mediation with no judicial incriminatur  
23 (ph.) -- let me switch subjects. What's the statute of  
24 limitations in Nevada for wrongful -- for a monetary damages  
25 claim for wrongful foreclosure pursuant to Nevada revised

1 statute, Section 107.560?

2 MS. HANDLEY: That section I believe is six months to  
3 seek to set aside the deed of trust.

4 THE COURT: That's --

5 MS. HANDLEY: There's also a wrong --

6 THE COURT: That's to set aside.

7 MS. HANDLEY: Right. Normal --

8 THE COURT: Here, that's not happening, okay. That  
9 didn't happen. And my question is, is there -- what is the  
10 applicable --

11 MS. HANDLEY: Yes.

12 THE COURT: -- statute of limitations for a money  
13 damages claim for wrongful foreclosure.

14 MS. HANDLEY: One year for tort claims such as this.

15 THE COURT: And when did he bring his action?

16 MS. HANDLEY: In -- I believe it was April --

17 THE COURT: How long after the foreclosure?

18 MS. HANDLEY: -- April of 2009.

19 THE COURT: How long after the foreclosure?

20 MS. HANDLEY: It was within the one-year period.

21 THE COURT: Okay. So the statute of limitations for a  
22 money damages claim for wrongful foreclosure, as you agree, has  
23 not run.

24 MS. HANDLEY: Well, he did not allege his wrongful  
25 foreclosure cause of action in the original complaint. The



1 original complaint was for fraud and quiet title. In that  
2 case, he was seeking to quiet title. He amended the complaint  
3 outside of the one-year period to allege the wrongful  
4 foreclosure.

5 THE COURT: Had foreclosure taken place at the time he  
6 filed his complaint?

7 MS. HANDLEY: No.

8 THE COURT: Okay. So he couldn't allege wrongful  
9 foreclosure because it hadn't been foreclosed yet, right?

10 MS. HANDLEY: Right.

11 THE COURT: But he alleged the basic facts that gave  
12 rise to his wrongful-foreclosure claim once GMAC went ahead and  
13 foreclosed.

14 MS. HANDLEY: He alleged the facts, yes, underlying  
15 the fraud claim. And it's our position that his fraud  
16 allegations really are necessary to support his claim that he's  
17 entitled wrongful foreclosure, but we don't believe that the  
18 Nevada case law supports that as a claim for wrongful  
19 foreclosure. We do believe it supports a claim for fraud and  
20 for other tort sounding -- like slander of title, which  
21 is -- and negligence, which is exactly what he did pursue and  
22 resolve. It's simply the wrongful-foreclosure claim that's not  
23 supported by Nevada law. There are -- we agree that Mr. Sharpe  
24 did have other causes of action. It's just not under the  
25 wrongful foreclosure heading. And when he resolved those other

1 claims and carved out wrongful foreclosure, he essentially  
2 carved out a claim that does not exist under Nevada law.

3 THE COURT: You're not getting any traction with your  
4 argument.

5 GMAC was aware, before it foreclosed, that Sharpe  
6 contended in an action he filed in state court that the  
7 promissory note was a forgery, correct?

8 MS. HANDLEY: Yes, they were aware of that contention.  
9 Your Honor, in Nevada there's no duty -- just because you're  
10 aware that there's allegations that the note and deed of trust  
11 are invalid, that doesn't create a duty to stop procedures in  
12 foreclosure.

13 THE COURT: Let's assume I accept that as true.

14 MS. HANDLEY: Um-hum.

15 THE COURT: But doesn't the loan servicer proceed at  
16 its own risk when it goes ahead and forecloses? Litigation can  
17 then go forward on the damages claim --

18 MS. HANDLEY: Correct.

19 THE COURT: -- and, if it's not a fore -- if it's not  
20 a forgery, you win. If it is a forgery, you lose.

21 MS. HANDLEY: Right. And Mr. Sharpe did pursue those  
22 damages claims in his negligence and slander-of-title causes of  
23 action; it's those claims that we assert would --

24 THE COURT: Is --

25 MS. HANDLEY: -- now preclude the wrongful-foreclosure

1 claim.

2 THE COURT: In Nevada, are damages available on a  
3 wrongful-foreclosure claim?

4 MS. HANDLEY: Yes, but --

5 THE COURT: I know you --

6 MS. HANDLEY: -- let me preface that with --

7 THE COURT: I heard your argument already why you  
8 don't think --

9 MS. HANDLEY: Yes, it's true; wrongful-foreclosure  
10 claim, yes. The borrower can either sue to set aside the  
11 foreclosure or they can sue to seek damages.

12 THE COURT: Okay. And so, absent what you say is  
13 preclusion that arises from a settlement that's not in  
14 writing --

15 MS. HANDLEY: There is a written settlement.

16 THE COURT: Well, not that -- there's nothing within a  
17 perimeter of a court that --

18 MS. HANDLEY: Correct.

19 THE COURT: -- determines anything with respect to  
20 wrongful foreclosure. So let's aside put aside case with no  
21 settlement. Okay? Would you agree that a borrower -- let's  
22 assume he gets an injunction but can't post the bond, okay, and  
23 they go ahead and they foreclose, okay, and he goes ahead with  
24 his damages claim. If he establishes at trial the facts  
25 alleged in his complaint, namely with the notes of forgery,

1 can't he prevail on his wrongful-foreclosure claim?

2 MS. HANDLEY: If that was the only claim presented in  
3 his complaint --

4 THE COURT: That's my hypothetical.

5 MS. HANDLEY: -- I think so, yes.

6 THE COURT: Okay.

7 MS. HANDLEY: But that wasn't what happened in this  
8 case. He --

9 THE COURT: Well, you say that.

10 MS. HANDLEY: -- pursued other claims.

11 THE COURT: You say -- if there were a clearer record  
12 of what transpired in state court, what the effect of the  
13 settlement was, you'd be on stronger ground.

14 Go ahead with your argument.

15 MS. HANDLEY: Thank you. I think I've made the points  
16 that we made in our objection and the supplemental objection.  
17 I think really, though, the main issue is we recognize -- or we  
18 assert that this can be determined as a matter of law. I don't  
19 think there are any factual issues that need to be addressed at  
20 the Nevada state court level.

21 THE COURT: Are you willing to concede, for purposes  
22 of your argument, that the note was a forgery?

23 MS. HANDLEY: No.

24 One last point I would like to make in address --

25 THE COURT: So if you're wrong about preclusion, would

1 you agree that there's a disputed issue of fact whether the  
2 note was a forgery?

3 MS. HANDLEY: If I'm wrong about preclusion --

4 THE COURT: Yes.

5 MS. HANDLEY: -- and if I'm wrong about the wrongful-  
6 foreclosure claim, then --

7 THE COURT: Well, when you say --

8 MS. HANDLEY: -- if it goes back to the trial court --

9 THE COURT: You're basing --

10 MS. HANDLEY: -- yes.

11 THE COURT: You're basing your argument about wrongful  
12 foreclosure based on preclusion from a settlement.

13 MS. HANDLEY: In part.

14 THE COURT: Well, what else?

15 MS. HANDLEY: The wrongful-foreclosure cause of action  
16 is simply not supported by Nevada law. There's two -- there's  
17 really two arguments; one, in Nevada, wrongful foreclosure  
18 doesn't arise based on the facts of this case. A wrongful-  
19 foreclosure cause of action is one to be asserted when the  
20 borrower's not in default. That's simply not the case here.

21 THE COURT: Ah.

22 MS. HANDLEY: Other causes of action --

23 THE COURT: For the borrower to be in default, it has  
24 to be a valid note, doesn't it?

25 MS. HANDLEY: Not under --

1 THE COURT: Doesn't it?

2 MS. HANDLEY: -- the Nevada case law. That's not --

3 THE COURT: Really?

4 MS. HANDLEY: -- a consideration --

5 THE COURT: Show me a case that says that the borrower  
6 is in default if he hasn't made payments on a forged note.

7 MS. HANDLEY: There is a wrong in that case; it's just  
8 not called --

9 THE COURT: Show me a case --

10 MS. HANDLEY: -- wrongful fore --

11 THE COURT: -- that says that a borrower is in default  
12 when it hasn't made payments on a note that it alleges is a  
13 forgery.

14 MS. HANDLEY: I am not aware of --

15 THE COURT: Okay.

16 MS. HANDLEY: -- any such case.

17 THE COURT: So what supports your argument? You keep  
18 saying that Nevada law doesn't support it, but you don't have  
19 any cases that say that.

20 MS. HANDLEY: I have a case that --

21 THE COURT: Collins doesn't say that.

22 MS. HANDLEY: No, but it outlines the elements for  
23 wrongful foreclosure, and every case --

24 THE COURT: Collins was a case where the borrower was  
25 in default, correct?

1 MS. HANDLEY: Corr -- correct. He alleged he wasn't,  
2 but, yes.

3 THE COURT: Okay. And here the borrower claims he  
4 wasn't in default because the note was void because it was a  
5 forgery, correct? Yes --

6 MS. HANDLEY: Not --

7 THE COURT: -- or no?

8 MS. HANDLEY: -- precisely. Not exactly.

9 THE COURT: Not precisely?

10 MS. HANDLEY: No, he doesn't allege he wasn't in  
11 default. He alleges the note was -- the deed of trust was  
12 invalid and GMAC proceeded with foreclosure anyway.

13 THE COURT: Okay.

14 MS. HANDLEY: There's not a single allegation, in the  
15 complaint or the amended complaint, that says, I was not in  
16 default.

17 THE COURT: If his position is the note was a forgery,  
18 how is it that you say he's in default?

19 MS. HANDLEY: His pos -- if --

20 THE COURT: Yeah, you tell me.

21 MS. HANDLEY: -- it was a forgery --

22 THE COURT: Hypothetically --

23 MS. HANDLEY: -- then --

24 THE COURT: -- if a note -- if you know --

25 MS. HANDLEY: Right.

1 THE COURT: -- if GMAC knew that the note was a  
2 forgery -- didn't here; I'm asking a hypothetical --

3 MS. HANDLEY: Um-hum.

4 THE COURT: -- how could a borrower be in default of a  
5 note that you know is a forgery?

6 MS. HANDLEY: A borrower cannot be in default on a  
7 note that's a forgery.

8 THE COURT: All right. And their contention is the  
9 note's a forgery and you're saying Nevada law -- the cases say,  
10 if there's a default -- there has to be a default for there to  
11 be a wrongful fore --

12 MS. HANDLEY: Um-hum. All of the wrongful-foreclosure  
13 case law deals with the fact scenario where there was a valid  
14 loan, and they're challenging whether there's a default.

15 THE COURT: So have you looked at --

16 MS. HANDLEY: In --

17 THE COURT: -- have you looked at Article 3 of the  
18 UCC? This is -- the note is a negotiable --

19 MS. HANDLEY: Yes.

20 THE COURT: -- instrument.

21 MS. HANDLEY: Yes.

22 THE COURT: And what does Article 3 of the UCC -- what  
23 happens where there's -- and it talks about unauthorized  
24 signature but --

25 MS. HANDLEY: Um-hum.



1 THE COURT: -- defines an authorized signature as  
2 including forgery.

3 MS. HANDLEY: Um-hum.

4 THE COURT: Have you looked at that?

5 MS. HANDLEY: Not recently, but it would not be a  
6 valid negotiable instrument.

7 THE COURT: Okay. Promissory note on a mortgage --

8 MS. HANDLEY: Correct.

9 THE COURT: -- in Nevada is a negotiable instrument --

10 MS. HANDLEY: Correct.

11 THE COURT: -- correct? Okay. So nobody has briefed  
12 the issues under the UCC. There is law on the UCC, about --

13 MS. HANDLEY: Um-hum.

14 THE COURT: -- unauthorized instruments, unauthorized  
15 signatures --

16 MS. HANDLEY: Correct.

17 THE COURT: -- including -- and that's defined as  
18 including forgery.

19 MS. HANDLEY: Right, and in Mr. Sharpe's fraud and  
20 quiet-title claims, he pursued those exact allegations. We're  
21 arguing that he's now precluded from --

22 THE COURT: All right, I have your argument.

23 MS. HANDLEY: -- seeking wrongful foreclosure just  
24 because those other claim -- he could have pursued those other  
25 causes of action; he did not. I agree that there's a wrong

1 alleged; the issue is whether that wrong is properly carved out  
2 under a wrongful-foreclosure claim. We assert that it was not  
3 because he resolved it with regard to the other claims where  
4 those same allegations and the facts underlying fraud were --

5 THE COURT: Were there --

6 MS. HANDLEY: -- settled.

7 THE COURT: -- other elements of those causes  
8 of -- the causes of action that were resolved --

9 MS. HANDLEY: Yes.

10 THE COURT: Were there other elements of those causes  
11 of action, other than forgery?

12 MS. HANDLEY: No. His -- if you look at the  
13 allegations in his complaint, with regard to negligence he  
14 alleges that the documents used to obtain the loan were a  
15 for --

16 THE COURT: Yes, but the negligence claim in  
17 Nevada -- what are the elements of a cause of action for  
18 negligence, in Nevada?

19 MS. HANDLEY: A breach, a duty -- a duty, a breach and  
20 damages. I mean, it's essentially -- it's actually different  
21 than the wrongful-foreclosure --

22 THE COURT: That's right --

23 MS. HANDLEY: -- claim for --

24 THE COURT: -- it is. It is.

25 MS. HANDLEY: But the --

1 THE COURT: That's the point.

2 MS. HANDLEY: -- underlying --

3 THE COURT: No, that's the point. Each of the causes  
4 of action that he alleged and were resolved include elements of  
5 those claims other than simply the note's a forgery. Correct?

6 MS. HANDLEY: Yes. With regard to the slander-of-  
7 title claim, I don't --

8 THE COURT: GMAC didn't own -- I've dismissed a bunch  
9 of quiet-title claims unless GMAC owned the loan -- owned the  
10 mortgage, where it's only a loan servicer. I've dismissed  
11 quiet-title claims. Under Nevada law, would a quiet-title  
12 claim lie against the loan servicer?

13 MS. HANDLEY: Yes, because the loan service -- at the  
14 time, GMAC was the beneficiary of record under the deed of  
15 trust, so it was the entity that held the record --

16 THE COURT: Okay.

17 MS. HANDLEY: -- beneficial interest under the deed of  
18 trust. So, yes, it would have.

19 THE COURT: All right. All right, let me hear from  
20 Mr. Lewis.

21 MR. LEWIS: Well, good morning, Your --

22 THE COURT: Go ahead. Why don't you go up to the  
23 podium, Mr. Lewis. You'll have to bend over.

24 MR. LEWIS: Good morning, Your Honor. Kenneth Lewis,  
25 local counsel to Mr. Sharpe. I believe Your Honor has already

1 hit most of the issues on the head; I do not, therefore, want  
2 to burden the Court's time with getting into rehashing the same  
3 arguments that are both in our papers and the very issues that  
4 Your Honor has already --

5 THE COURT: But tell me --

6 MR. LEWIS: -- raised.

7 THE COURT: -- tell me why in your view the settlement  
8 of the claims that were settled doesn't -- why they don't  
9 preclude Mr. Sharpe from proceeding with the wrongful-  
10 foreclosure claim.

11 MR. LEWIS: Two reasons, Your Honor; the first reason:  
12 the parties, including GMAC, specifically carved out the  
13 wrongful-foreclosure claim in the very -- in the settlement  
14 agreement. GMAC signed the settlement agreement. If GMAC is  
15 now telling us, well, the settlement agreement doesn't really  
16 mean what it means, I mean, I think we've got much more serious  
17 issues with GMAC than res judicata and collateral estoppel. I  
18 mean, that claim was specifically preserved.

19 With respect to the res judicata and collateral  
20 estoppel issues that they then raise arising from agreeing to  
21 dismiss those claims for relief, you don't need those other  
22 claims. Each and every allegation that is required in order to  
23 allege a valid claim for wrongful foreclosure is still alive in  
24 that complaint. That claim for relief for wrongful foreclosure  
25 specifically incorporates each and every allegation that is

1 required.

2 The only thing that the parties did, in essence, was  
3 agree to narrow the issues for trial. We were no longer saying  
4 we're going to seek a --

5 THE COURT: You weren't trying to unwind the --

6 MR. LEWIS: -- a negligence claim.

7 THE COURT: -- foreclosure anymore.

8 MR. LEWIS: I'm sorry, Your Honor?

9 THE COURT: You weren't trying to unwind a  
10 foreclosure.

11 MR. LEWIS: Right. It's too late. There's no longer  
12 a slander-of-title claim. GMAC already foreclosed on the  
13 property, and the property was already sold. It's moot. It's  
14 too late to do that. Likewise, negligence didn't apply. What  
15 did apply is wrongful foreclosure.

16 And to the extent -- to say that some claims were then  
17 resolved under res judicata and collateral estoppel, just makes  
18 no sense. Every res-judicata and collateral-estoppel case  
19 stands for the proposition -- this is first-year civil  
20 procedure; it's based on a subsequent action. The parties were  
21 merely narrowing the issues for trial. And if they're talking  
22 about judicial -- the promotion of judicial economy, taking  
23 their argument to their reasonable conclusion, no party would  
24 ever agree to waive any claims for a trial and they would go  
25 forward with ten or twenty claims that would require each and

1 every party to prosecute and defend, and would require every  
2 judge to have to decide each and every issue in each and every  
3 claim in a complaint, if the parties didn't properly narrow  
4 claims for trial. That's all that happened here.

5 So as I said, it's a real problem that GMAC is now  
6 telling us that that's -- that they're trying to now sneak in  
7 res judicata and collateral estoppel when they specifically  
8 agreed to the --

9 THE COURT: So what's your view about --

10 MR. LEWIS: -- to the preservation of that claim.

11 THE COURT: -- the Nevada Supreme Court ruling in  
12 Collins? What's the impact of Collins --

13 MR. LEWIS: Impact of Collins.

14 THE COURT: -- in this case?

15 MR. LEWIS: Collins, they looked at -- it's  
16 interesting because the trusts -- they like to say one or two  
17 sentences from all of these decisions and say that that's what  
18 they stand for. What's interesting is every decision I cited,  
19 but one, were the very decisions that the trusts cited in their  
20 initial set of papers. All I did was talk about what those  
21 cases really stood for.

22 THE COURT: So tell me what you think Collins really  
23 stands for.

24 MR. LEWIS: What Collins says is you have to look at  
25 the underlying obligation itself, to see if there is a concern

1 or a -- to see if there's an underlying defect with respect to  
2 the note. It's not whether or not there's a default. Of  
3 course if there's a default or not default -- that's sort of  
4 just the one sentence they say. But in Collins, to the extent  
5 that the loan was usurious, of course there was no obligation  
6 to pay on a usurious note. Likewise, in the California case  
7 which we cited, where tender was accused -- and they go on to  
8 say, well, tender doesn't apply because it's California law.  
9 In their first set --

10 THE COURT: No --

11 MR. LEWIS: -- of papers, they tell us that California  
12 law applies to Nevada; and in fact, Mr. Winterton can confirm  
13 that. In Nevada they follow both Nevada law and --

14 THE COURT: Except the tender rule.

15 MR. LEWIS: -- California law. Well, because it  
16 doesn't go to their advantage. But tender -- I mean, it's just  
17 a word. I mean, whether it's performance or tender, I mean,  
18 there's no obligation to pay on a note if the note doesn't  
19 exist or if the note is defective or if there is an underlying  
20 issue otherwise, as Your Honor pointed out in the first five  
21 minutes of argument. It's obvious. I mean, obviously it is --

22 THE COURT: What are Mr. Sharpe's narratives?

23 MR. LEWIS: Well, in the state court there is  
24 a -- other parties did default and the court did have --

25 THE COURT: Well, he only gets to recover when

1 recovery -- so --

2 MR. LEWIS: Right. There's --

3 THE COURT: -- what has he received so far?

4 MR. LEWIS: There's -- so far he settled with  
5 Fidelity, and I believe that settlement was 60,000 dollars; the  
6 parties --

7 THE COURT: What --

8 MR. LEWIS: -- can correct me.

9 THE COURT: What do you believe his  
10 damages -- remaining damages --

11 MR. LEWIS: Well, in the prove-up damage trial that  
12 they had with respect to the defaulting parties, I believe the  
13 claim was approximately 1.2 million.

14 THE COURT: Forget that. You try to argue that  
15 somehow I'm bound by what happened as to other parties on  
16 default; that's not -- no preclusive effect here whatsoever.  
17 You don't really believe that I'm precluded --

18 MR. LEWIS: No.

19 THE COURT: -- that they're precluded by the damages  
20 award, based on a default judgment against other parties, do  
21 you?

22 MR. LEWIS: My understanding is, at this juncture,  
23 Your Honor, in essence it's not a factual determination as to  
24 what the -- one, whether or not there is a fraud, a fraudulent  
25 note and, two, if there was --



1 THE COURT: Has he ever --

2 MR. LEWIS: -- what the damages are.

3 THE COURT: -- found Tracy?

4 MR. LEWIS: I'm sorry?

5 THE COURT: Has he ever found Tracy?

6 MR. LEWIS: I don't know, Your Honor. I don't know.

7 But to get to your point, though, with respect to damages, that  
8 would be a factual determination. I can certainly -- the  
9 parties --

10 THE COURT: What do you contend his damages are?

11 They're not a million dollars, Mr. Lewis.

12 MR. LEWIS: It would be -- it would be the value of  
13 the home at the time of the foreclosure.

14 THE COURT: And what do you believe the value -- and  
15 Nevada counsel is on the phone. What do you believe -- what is  
16 your good-faith belief as to what Mr. Sharpe's damages are in  
17 the event he prevails in establishing wrongful foreclosure?

18 MR. LEWIS: And I can step -- because I worked with  
19 counsel --

20 THE COURT: Okay.

21 MR. LEWIS: -- on this --

22 THE COURT: So what's the answer --

23 MR. LEWIS: -- when we attempted to resolve it.

24 THE COURT: -- to that question?

25 MR. LEWIS: I believe that we obtained an appraisal

1 for the property as of the time of the foreclosure.

2 THE COURT: Yes.

3 MR. LEWIS: And we had retained that appraiser with  
4 the consent of the trust; this way we wouldn't have --

5 THE COURT: Sure.

6 MR. LEWIS: -- fighting --

7 THE COURT: Okay.

8 MR. LEWIS: -- fights over --

9 THE COURT: And what's the appraiser's --

10 MR. LEWIS: And I believe -- I don't have it in front  
11 of me; Mr. Winterton may. I believe it was five-and-change,  
12 five -- I have to get --

13 THE COURT: Mr. Winterton, are you able to tell me  
14 what the appraisal showed for the value of the property?

15 MS. HANDLEY: I believe it was 580,000 dollars, Your  
16 Honor.

17 THE COURT: And, Ms. Handley, did the parties agree on  
18 identifying the appraiser so you wouldn't get into a fight  
19 about --

20 MS. HANDLEY: Initially --

21 THE COURT: -- competing --

22 MS. HANDLEY: Yeah --

23 THE COURT: -- battle of experts on appraisal?

24 MS. HANDLEY: We do not dispute their appraiser. We  
25 initially agreed to find a mutually acceptable appraiser.

1 Mr. Winterton obtained an appraisal and notified me after the  
2 fact. I did not thereafter object to his appraiser. So we  
3 didn't agree beforehand but we don't object to the appraisal.

4 THE COURT: Okay, so the appraisal, you think, was  
5 580,000?

6 MS. HANDLEY: Correct.

7 THE COURT: Okay.

8 MR. LEWIS: And then subtracting from that what the  
9 amount of the first mortgage was -- or should have been at the  
10 time of the foreclosure -- and again, because I  
11 don't -- actually, it may be in my initial set of papers; if I  
12 can have a moment, I can --

13 THE COURT: Sure.

14 MR. LEWIS: -- get those.

15 THE COURT: Go ahead.

16 (Pause)

17 MR. LEWIS: I would also ask, if Mr. Winterton is on  
18 the phone, if he can --

19 THE COURT: Sure. That's fine. Either one of you.

20 MR. LEWIS: -- check his file.

21 THE COURT: Yeah.

22 MR. LEWIS: I may not have it in the papers.

23 THE COURT: So the original loan was 191,000; that's  
24 what got refinanced?

25 MR. LEWIS: Okay.

1 THE COURT: Is that -- am I -- Mr. Winterton, is that  
2 right? HomeTown Lending --

3 MR. WINTERTON: Yeah, that's correct.

4 MR. LEWIS: Yeah.

5 THE COURT: -- 191,000.

6 MR. WINTERTON: I thought it had been reduced to about  
7 159- at the time of the sale.

8 THE COURT: When you say "reduced to 159-", you're  
9 saying that, had it not been refinanced, the first loan had  
10 been reduced to 159,000?

11 MR. WINTERTON: That's my recollection. I can check  
12 my note.

13 (Pause)

14 THE COURT: Mr. Winterton, did they ever find Tracy?

15 MR. WINTERTON: Yes, we have.

16 THE COURT: Have you ever collected any money from  
17 her?

18 MR. WINTERTON: No, we have not.

19 THE COURT: Did you collect any of the default  
20 judgment from -- any portion of the default judgment from any  
21 other parties?

22 MR. WINTERTON: Just from the settlement with  
23 GMA -- or, I mean, settlement with Fidelity. The other  
24 parties -- the mortgage company went belly-up. There is a  
25 criminal investigation with those parties and, last we traced

1 them, they had gone to Mexico and we have not been able to find  
2 them there.

3 THE COURT: Yeah. Okay.

4 MS. HANDLEY: Your Honor, if I might speak with regard  
5 to the damages that you're inquiring about?

6 THE COURT: Sure, go ahead, Ms. Handley.

7 MS. HANDLEY: I believe --

8 THE COURT: I'm not deciding anything. I'm just  
9 trying to get a sense --

10 MS. HANDLEY: Right.

11 THE COURT: -- for what this -- what's really going on  
12 here.

13 MS. HANDLEY: Understood. I think Mr. Winterton is  
14 correct that at the time of the refinance, the original loan  
15 was about 159, 160.

16 But in addition from the proceeds of the loan at  
17 issue, Mr. Sharpe's credit cards were paid. They were Mr.  
18 Sharpe's, in his name only -- the credit cards. A large  
19 portion of the loan proceeds -- 202,000 dollars -- was  
20 deposited in a joint checking account held by Mr. Sharpe and  
21 Tracy Sharpe, who was his girlfriend at the time.

22 THE COURT: Yes.

23 MS. HANDLEY: There were also some other taxes that  
24 were paid, so any calculation of damages should be reduced by  
25 amounts that Mr. Sharpe --

1 THE COURT: I just --

2 MS. HANDLEY: -- benefitted from.

3 THE COURT: You know, in very, very limited -- looking  
4 at the White and Summers Treatise on the UCC, in the section  
5 dealing with unauthorized signatures which, as I say, the UCC  
6 defines as including forgery, these cases sometimes involve so-  
7 called ratification and accepting the benefits of the forgery.

8 So it got refinanced. It says it was a forgery. Let  
9 me assume that that's true. It resulted in excess proceeds  
10 from the refinancing, and the issue is where'd the money go?  
11 And you're telling me, Ms. Handley, that Mr. Sharpe benefitted  
12 to some amount from it because it was used to pay his debts or  
13 some portion of his debts.

14 My quick glance, which is far from any -- I'm not  
15 suggesting what I'm saying is authoritative -- in some cases,  
16 it's tough luck. It may have been an authorized forgery, but  
17 if you, for some period of time, accept the benefits from it,  
18 well, you can't later disavow it.

19 How and when Mr. Sharpe learned that there was a  
20 forgery and that money that was received was gone, what did he  
21 think when his -- the money was coming from when his bills were  
22 paid, whether it's taxes or credit cards?

23 I'm just envisioning a fairly messy -- if -- and I'm  
24 not ruling yet, but if the Court were to conclude that he has a  
25 wrongful foreclosure claim that he can assert, it could well be

1 that the crucial factual issues, was it a forgery, I think he'd  
2 have the burden of establishing that it's a forgery.

3 Yes, I understand -- Mr. Lewis, you say, you know, the  
4 photo ID that the mortgagee had showed a Hispanic and Mr.  
5 Sharpe is a black man, and you know -- I mean, you'd recount  
6 some of those facts. You know, you could wind up with an  
7 expensive litigation about just this issue of -- I'm using the  
8 term loosely -- ratification, because there's a whole bunch of  
9 stuff that follows from that.

10 MR. LEWIS: Your Honor, I --

11 THE COURT: Let me just -- this last thought out. All  
12 of that for an unsecured claim that's going to be paid in very,  
13 very diluted dollars. You all better think about is this the  
14 road you want to head down. But you'll decide.

15 Go ahead, Mr. Lewis.

16 MR. LEWIS: Your Honor, and that was my point in the  
17 context of the discussions that I did have with Mr.  
18 Wishnew -- and again, I'm not running the foul of 408 at all.

19 THE COURT: No.

20 MR. LEWIS: I mean, we --

21 THE COURT: I don't want to know what you --

22 MR. LEWIS: We were discussing the very issue about,  
23 you know, what of those proceeds benefitted him and didn't  
24 benefit him. And, you know, our position, of course, is he  
25 didn't even know the proceeds went in there. But of course, if

1 something paid his debt, we were deducting that. But I mean,  
2 that's really where we were. But unfortunately, we were unable  
3 to resolve this issue. But we do understand the Court's issue,  
4 which is the very issue that we were trying to resolve. And so  
5 we didn't have three sets of papers and someone flying from  
6 California to address an unsecured claim because we are --

7 THE COURT: Did you fly from California or Nevada?

8 MS. HANDLEY: Well, I practice in Nevada. I live in  
9 California.

10 THE COURT: Oh, okay.

11 MR. LEWIS: So we are very aware of those issues and,  
12 in fact, tried to resolve it along the lines that Your Honor is  
13 suggesting. Unfortunately, we weren't anywhere near there with  
14 respect to what Your Honor is suggesting.

15 THE COURT: It's about the nicest weather we've had in  
16 New York in quite some time, so enjoy yourself --

17 MS. HANDLEY: I was actually very surprised.

18 THE COURT: -- while you're here.

19 MS. HANDLEY: Yes. Very pleasant.

20 MR. WISHNEW: Ms. Handley brought it with her.

21 THE COURT: I'm sorry?

22 MR. WISHNEW: Ms. Handley brought it with her.

23 THE COURT: Good.

24 MS. HANDLEY: If I might mention, too, Your Honor,  
25 you're exactly correct about the underlying claim and whether



1 there was a ratification. Those are the defenses that were  
2 assertive the Nevada state court action. We obviously didn't  
3 bring that up here in these papers because we're --

4 THE COURT: It's not relevant for the --

5 MS. HANDLEY: It's not relevant, exactly.

6 THE COURT: This is --

7 MS. HANDLEY: That's the --

8 THE COURT: The standard here is really, you know,  
9 failure to state a claim. This is -- that's what we're really  
10 dealing with on a claim objection. This is, as a matter of  
11 law, does this claim fail to state a claim for relief.

12 All right, I'm going to it under submission. Thank  
13 you.

14 MS. HANDLEY: Thank you, Your Honor.

15 THE COURT: Is there anything -- Mr. Lewis, there  
16 wasn't anything you wanted to add that might --

17 MR. LEWIS: No, I think we've covered everything.  
18 Thank you.

19 THE COURT: Ms. Handley, is there anything you wanted  
20 to add?

21 MS. HANDLEY: No, Your Honor. Thank you very much.

22 MR. LEWIS: Thank you very much, Your Honor.

23 THE COURT: Okay. Thank you. Okay.

24 MS. HANDLEY: Your Honor, may I be excused?

25 THE COURT: You certainly can. Enjoy New York before

1 you go home.

2 MS. HANDLEY: Thank you.

3 THE COURT: Where in California do you live?

4 MS. HANDLEY: San Diego.

5 THE COURT: That's a long way from Nevada.

6 MS. HANDLEY: Yes. Yes, it is.

7 THE COURT: Okay.

8 MR. LEWIS: May I also be excused, Your Honor?

9 THE COURT: You can.

10 MR. LEWIS: Thank you, Your Honor.

11 THE COURT: Thanks, Mr. Lewis.

12 MR. WISHNEW: Your Honor, Jordan Wishnew, Morrison

13 Foerster, for the Rescap Borrower Claims Trust. The next

14 matter on today's agenda is item 3 on page 10, the Rescap

15 Borrower Claims Trust Eighty-Second Omnibus Objection to Claims

16 solely as it relates to the claim filed by Kenneth Dlin.

17 I'm not sure if anyone on Mr. Dlin's behalf is on the  
18 phone.

19 THE COURT: Mr. Dlin, are you or anybody on your  
20 behalf on the phone?

21 MR. WILSON: Good morning, Your Honor. Brian Wilson  
22 on behalf of Mr. Kenneth Dlin as creditor's representative.

23 THE COURT: Are you a lawyer, Mr. Wilson?

24 MR. WILSON: Yes, I am, Your Honor.

25 THE COURT: And -- okay, where is your office?

1 MR. WILSON: In Bailey, Colorado.

2 THE COURT: Okay, all right. You're a member of the  
3 Colorado Bar?

4 MR. WILSON: I am.

5 THE COURT: Okay. Thank you, Mr. Wilson.

6 Mr. Wishnew?

7 MR. WISHNEW: Thank you, Your Honor. Your Honor,  
8 through the eighty-second omnibus claims objection, the  
9 Borrower's Trust seeks to expunge Mr. Dlin's proof of claim  
10 because it does not represent a valid pre-petition claim  
11 against GMAC Mortgage. So it's the Borrower's Trust position  
12 that Mr. Dlin has not proven, by a preponderance of the  
13 evidence, any specific wrongdoing by the debtors.

14 In support of the objection and the reply, the  
15 Borrower Trust submitted a supplemental declaration by Kathy  
16 Priore, associate counsel to the Rescap Liquidating Trust.

17 Ms. Priore is on the phone today and available to  
18 answer any questions the Court might have for her.

19 GMAC Mortgage's purported liability appears to stem  
20 from Mr. Dlin's belief that GMAC told him he could not be  
21 considered for a loan modification when he was current on his  
22 loan and that the modification was offered to him increased his  
23 monthly payments.

24 THE COURT: Let me sort of cut to the chase.

25 MR. WISHNEW: Of course, Your Honor.

1 THE COURT: Okay. Where are the investor guidelines?

2 MR. WISHNEW: Where are the investor guidelines?

3 THE COURT: Yes. You have -- there -- we've looked  
4 and we don't seem to have those.

5 MR. WISHNEW: That's -- Your Honor, the investor  
6 guidelines are what, at this point, is represented in Ms.  
7 Priore's declaration --

8 THE COURT: That's hearsay.

9 MR. WISHNEW: -- embodied in the servicing notes.

10 THE COURT: That's hearsay. Okay, your arguments all  
11 seem to -- you've focused on what is permitted or required by  
12 the investor guidelines.

13 MR. WISHNEW: Correct, Your Honor.

14 THE COURT: I'm right in that?

15 MR. WISHNEW: Yes, Your Honor.

16 THE COURT: Okay. But I don't have the investor  
17 guidelines. I have hearsay declaration about what the investor  
18 guidelines provided. So --

19 MR. WISHNEW: Well, to --

20 THE COURT: -- according -- you know --

21 MR. WISHNEW: What you have, Your Honor, in the  
22 servicing notes is a contemporaneous recording of --

23 THE COURT: Who was the investor?

24 MR. WISHNEW: The investor on this loan -- one minute,  
25 Your Honor. The investor on the loan, Your Honor, is

1 GreenPoint Mortgage Funding, Inc.

2 THE COURT: Did they remain -- they were the -- they  
3 didn't hold the note?

4 MR. WISHNEW: I'm sorry. I'm sorry. It eventually  
5 got --

6 THE COURT: That was the originator?

7 MR. WISHNEW: That was the original (sic), I  
8 apologize. They were the originator. It eventually got placed  
9 into a securitization. HSBC Bank was the trustee.

10 THE COURT: Okay. So, you what? You argue that Mr.  
11 Dlin essentially raises three causes of action premised on two  
12 alleged misrepresentations by Jeannette (ph.)?

13 MR. WISHNEW: That's correct, Your Honor.

14 THE COURT: One, that Dlin needed to be in default in  
15 order to qualify for a loan modification and that somebody from  
16 GMAC instructed him to do so? That's one allegation?

17 MR. WISHNEW: Yes, Your Honor.

18 THE COURT: And second allegation that if he defaulted  
19 the loan modification you offered, and you dispute both of  
20 those assertions of fact?

21 MR. WISHNEW: That's correct, Your Honor.

22 THE COURT: Okay.

23 MR. WISHNEW: And in support of our argument, we cite  
24 to servicing notes which represent contemporaneous record of  
25 conversations between the loan servicing representative for

1 GMAC Mortgage and Mr. Dlin --

2 THE COURT: But do you believe -- are the loan  
3 servicing notes competent and relevant material evidence that  
4 could be admitted at a hearing in this Court to estab -- you're  
5 relying on the investor guidelines. And what you set forth are  
6 representations in Ms. Priore's declaration about what the  
7 investor guidelines were.

8 MR. WISHNEW: Um-hum.

9 THE COURT: That's hearsay. Isn't it? Yes or no?

10 MR. WISHNEW: I -- well, to the extent that Ms. Priore  
11 can testify, based upon her knowledge and the knowledge she  
12 acquired as part of her job, and her familiarity with the loan  
13 file, I don't know that it would be hearsay, Your Honor.

14 THE COURT: Who's the investor? Whose guidelines  
15 would be up -- HSBC? They were the trustee?

16 MR. WISHNEW: Yes, Your Honor.

17 THE COURT: Okay. Do you think HSBC has a written  
18 document applicable for the period at issue that sets forth  
19 what their investor guidelines are? Otherwise, it's just left  
20 to -- is it just left to the loan servicer to say whatever it  
21 feels like saying about well the investor guidelines here are  
22 no modifications unless sixty days in default?

23 MR. WISHNEW: No. I mean, obviously the servicer is  
24 acting for the benefit of and at the direction of the loan  
25 investor, and can only take action authorized by the loan

1 investor.

2 THE COURT: Is there something in the servicing notes  
3 that's specific -- not what somebody told Dlin, but sets forth  
4 the HSBC investor guidelines for this loan or loans of this  
5 type or category, or included within trusts as to which HSBC is  
6 the servicer?

7 MR. WISHNEW: I don't believe there would be a  
8 specific iteration of, or essentially a copy and paste, of the  
9 investor guidelines into the servicing notes. Rather, the  
10 servicing notes represent a contemporaneous record of  
11 conversations between the loan service representative and the  
12 borrower on inquiries related to an activity concerning the  
13 underlying loan.

14 THE COURT: But doesn't your position depend upon the  
15 truth? Let's assume that the trust's representations of what  
16 was told to Mr. Dlin -- that the Court would define those to be  
17 that's what was said.

18 MR. WISHNEW: Right.

19 THE COURT: Doesn't the outcome on this objection  
20 hinge on whether that was an accurate -- that the GMAC  
21 representative accurately stated what the investor guidelines  
22 were? I mean, your -- the trust's position is that a debtor  
23 representative told Dlin that investor guidelines don't permit  
24 a modification unless Lynn (sic) is in default. There's one  
25 place where it suggests it has to be 60 days in default. Let's

1 assume that.

2 MR. WISHNEW: Correct, Your Honor. Yes, the  
3 representation was that if a borrower is current on his or her  
4 mortgage, then a loan modification option is not available to  
5 them. Only if they are in default is -- can they first be  
6 considered for the possibility of a loan modification.

7 THE COURT: Okay. And how do I know that that is an  
8 accurate statement? Why would that be admissible evidence?  
9 Doesn't the outcome on this claim depend, in the first  
10 instance, on that being an accurate statement of the investor  
11 guidelines?

12 MR. WISHNEW: Yes, Your Honor.

13 THE COURT: Dlin also said that the GMAC  
14 representative told him that a loan modification -- if he  
15 defaulted, a loan modification would be offered to him. The  
16 trust disputes, based on what's in the servicing notes, that  
17 that's what was said, correct?

18 MR. WISHNEW: True, Your Honor. Yes.

19 THE COURT: Isn't that a factual dispute?

20 MR. WISHNEW: I guess to your point, Your Honor, I  
21 mean, simply saying that's not the case, I don't know that that  
22 necessarily meets Mr. --

23 THE COURT: And Mr. Dlin makes very express  
24 representations about what was told to him by a GMAC  
25 representative. It may be accurate. It may not. He said if



1 I'm in default, they'll approve a loan modification. The  
2 trust's position is that's not what was said to him. Isn't  
3 that a factual dispute?

4 MR. WISHNEW: To the extent the Court accepts  
5 the -- find the requisite specificity to sustain a factual  
6 issue, yes, Your Honor.

7 THE COURT: Is there anything lacking in the  
8 specificity of what Mr. Dlin says he was told by GMAC?

9 MR. WISHNEW: I guess the way the trust sees it, Your  
10 Honor, is he simply says that's not the case. And I think  
11 making the arg --

12 THE COURT: No, he -- that's not. He doesn't just say  
13 that's not the case. He's quite explicit about -- in his  
14 reply, certainly -- or this is your reply, but he -- isn't Dlin  
15 specific about what was said to him by a GMAC representative?

16 MR. WISHNEW: Yes, Your Honor.

17 THE COURT: Okay. He says this and you dispute it.  
18 Your evidence in support is the servicing notes.

19 MR. WISHNEW: Yes, Your Honor.

20 THE COURT: To the extent -- you know, the servicing  
21 notes have come into evidence in other proceedings and  
22 contemporaneous -- assuming you've established that they're  
23 business records, they're contemporaneous notes, et cetera.

24 MR. WISHNEW: Yes.

25 THE COURT: In other proceedings before the Court,

1 servicing notes have been admitted.

2 MR. WISHNEW: Yep.

3 THE COURT: Let me move to a different sheet. Just  
4 searching through my notes.

5 (Pause)

6 THE COURT: So Mr. Dlin's claim essentially proceeds  
7 on three theories: the coerced default theory. You told him  
8 he had to default. The short-sale theory and then the standing  
9 theory.

So with respect to the short-sale theory --

10 MR. WISHNEW: Yes, Your Honor?

11 THE COURT: -- tell me why you believe the objection  
12 to the claim on the short sale theory should be sustained.

13 MR. WISHNEW: With regards to the short sale theory,  
14 the evidence that's put forth by the borrower trust suggests  
15 that Mr. Dlin's representative was told there were two  
16 conditions to having the short sale approved, which is that it  
17 had to yield eighty five percent of the market -- on a net  
18 basis, yield eighty five percent of the market value to the  
19 investor. And secondly, it required the approval of a second  
20 lien holder.

21 THE COURT: And that was Bank of America?

22 MR. WISHNEW: Correct, Your Honor.

23 It's the second prong that was never satisfied here.

24 And we put in -- we submit correspondence with Ms. Lloyd, Mr.

25 Dlin's representative, in which we advise her that she needs to

1 let us know before, I think it's June 28th, whether the second  
2 lien lender has signed off on the short sale and that the  
3 foreclosure was going forward -- it was not going to be  
4 adjourned -- and we needed to know whether the approval was  
5 received.

6 Our records reflect it was never -- we were never  
7 advised, prior to the scheduled foreclosure sale, that the BofA  
8 signed off on the short sale offer. So that's why we believe  
9 it was appropriate -- the short sale was appropriate and was  
10 not improper in --

11 THE COURT: Okay.

12 The third theory, the standing theory --

13 MR. WISHNEW: Yes, Your Honor.

14 THE COURT: -- if I understand your argument  
15 correctly, it's basically that the Colorado State District  
16 Court, in authorizing the sale, found that GMAC had standing to  
17 foreclose, and that precludes Mr. Dlin from challenging the  
18 sale by alleging that GMACM lacks standing.

19 MR. WISHNEW: That's correct, Your Honor.

20 THE COURT: So Colorado Rule of Civil Procedure,  
21 Section 120(d) -- D as in David -- reads, "Neither the granting  
22 nor the denial of the motion under this rule shall constitute  
23 an appealable order or judgment. The granting of any such  
24 motion shall be without prejudice to the right of any person  
25 aggrieved to seek injunctive or other relief in any court of

1 competent jurisdiction, and the denial of any such motion shall  
2 be without prejudice to any right or remedy of the moving  
3 party."

4 Doesn't Rule 120(d) establish the lack of merit in  
5 your argument that -- it seems to -- it's not a -- it's clearly  
6 not a final order; it's not appealable, and the rule expressly  
7 states that it's "without prejudice to the right of any person  
8 aggrieved to seek injunctive or other relief." Well, now he's  
9 seeking damages relief. So what's the basis for your argument  
10 that he's precluded from challenging GMAC's standing?

11 MR. WISHNEW: Well, I think, Your Honor, it's the fact  
12 of -- from a preclusion standpoint, I understand your  
13 points -- Your Honor's points.

14 THE COURT: You agree with my point?

15 MR. WISHNEW: Well, based upon the plain reading of  
16 120(d) -- well, it --

17 THE COURT: This doesn't go to the issue of whether  
18 GMAC actually had standing or didn't. The issue is, is Dlin  
19 precluded now from challenging GMAC's standing to foreclose?

20 MR. WISHNEW: I think, Your Honor, that the statute  
21 certainly gives him the right to seek it. But at the same  
22 time, it doesn't preclude us from making the argument that it's  
23 a matter that's already been --

24 THE COURT: Oh, really? Come on.

25 MR. WISHNEW: If nothing else, Your Honor, I believe

1 that it's certainly persuasive for this Court to consider, in  
2 evaluating the same argument, and simply seeing this as a  
3 reiteration of what's already been reviewed by another court.

4 THE COURT: So what -- tell me -- what's the language  
5 in the order that -- because there's no decision; there's no  
6 order that was entered. You have the language of the order in  
7 which the Colorado District Court permitted the foreclosure to  
8 go forward? Isn't it to the effect -- I don't have it in front  
9 of me but -- GMAC represented that it had standing? I didn't  
10 see any language where it expressly -- whether it would be  
11 preclusive or not, there's nothing in the order that suggests  
12 that the Court found, as a fact, that GMAC had standing.  
13 Rather, he recites that GMAC represented certain facts.

14 You have the order?

15 MR. WISHNEW: One of my many arms is looking through  
16 the exhibits.

17 (Pause)

18 MR. WISHNEW: So Your Honor, if you look at Exhibit  
19 R --

20 THE COURT: Okay, let me turn to it. Hang on.

21 MR. WISHNEW: This is at docket number 8485-19.

22 THE COURT: Yes, I have it.

23 MR. WISHNEW: Okay.

24 The second to last paragraph -- or third to last  
25 paragraph starts, "The Court finds". "The Court finds that

1 there is a reasonable probability that a default exists, as  
2 alleged in the motion, in order to invoke the power of sale in  
3 said deed of trust; that the provisions of CRCP, Rule 120 and  
4 the Service Members Civil Relief Act, as amended, have been  
5 complied with; that the venue in this action is proper. The  
6 order authorizing this sale should be granted."

7 And then, it goes on to authorize the sale of the  
8 property by the public trustee.

9 THE COURT: A reasonable probability is not the  
10 finding of a fact, is it?

11 MR. WISHNEW: Well, I think, "The Court" -- I mean,  
12 the paragraph specifically starts, "The Court finds". So --

13 THE COURT: That there's a reasonable probability,  
14 not --

15 MR. WISHNEW: Well, it could mean -- the fact of the  
16 matter is that it's --

17 THE COURT: And that's all he had to find under  
18 Colorado law so the foreclosure could go forward.

19 All right, I have your point.

20 MR. WISHNEW: Okay.

21 THE COURT: Let me hear from Mr. Wilson.

22 MR. WILSON: Good morning, Your Honor. Brian Wilson,  
23 in Bailey, Colorado, on behalf of Kenneth Dlin.

24 THE COURT: Go ahead.

25 MR. WILSON: Your Honor, the concern that we have is

1 that we never really did see any guidelines even though we'd  
2 asked for it previously when the District Court case here in  
3 Colorado was still in full force and effect. We did get  
4 through to partial discovery and, in fact, even had a trial set  
5 in front of a jury before this was removed to your court, Your  
6 Honor. We never saw any such guidelines. We were basically  
7 told that they didn't exist or that they couldn't get them.

8 So that was first concern that we have about coerced  
9 default was that we were never able to see those guidelines.  
10 If that's something that could be produced, it would certainly  
11 be interesting to us.

12 Secondly, Your Honor, as far as the short sale theory,  
13 we do believe that there is a factual dispute on whether or not  
14 Mr. Dlin was told by agents of GMAC, at that point in time,  
15 that he would be given some kind of a short sale deal and  
16 whether or not the parties that were involved informed the GMAC  
17 representatives that, in fact, they were actively seeking a  
18 Bank of America waiver, or at least some kind of a payout.  
19 There's no doubt that that exists, and that's something that we  
20 do dispute as far as the factual record.

21 THE COURT: Let me ask this, Mr. Wilson.

22 MR. WILSON: Yes, Your Honor.

23 THE COURT: Did Bank --

24 MR. WISHNEW: And then lastly, Your Honor --

25 THE COURT: No, stop.

1 MR. WILSON: -- as far --

2 THE COURT: Let me ask my question.

3 MR. WILSON: Oh, yes, please, go ahead.

4 THE COURT: Did Bank of America give its consent to a  
5 short sale?

6 MR. WILSON: The interesting thing is, they did, but  
7 it was belated.

8 THE COURT: When did Bank of America consent to a  
9 short sale?

10 MR. WILSON: One week later, Your Honor.

11 THE COURT: One week after the foreclosure?

12 MR. WILSON: Yes.

13 THE COURT: Let's -- let me make a note.

14 MR. WILSON: That is my understanding. And Your  
15 Honor, again, we're dealing with large banks making decisions,  
16 and so it's difficult that it would take much longer for Bank  
17 of America to come back and to make some kind of a  
18 determination. That's exactly what transpired here. And just  
19 a note of correction, Your Honor, it was actually July 28th,  
20 not June 28th, when that occurred, where Mr. Dlin was seeking  
21 to have Bank of America accept a payout on a short sale offer.

22 MR. WISHNEW: My apologies.

23 THE COURT: Okay.

24 Had you taken any discovery from BofA?

25 MR. WILSON: Your Honor, at this point, we've only



1 been able to get limited discovery from any of the parties.  
2 Part of the reason is that when we were in negotiations -- as I  
3 mentioned in our response to the objection, we were in  
4 negotiations, at that point in time, with then GMAC, and we  
5 believed that we had a settlement that was in the offing.

6 THE COURT: I don't know -- I don't want to know what  
7 the terms of the proposed the settlement were.

8 MR. WILSON: Understood, Your Honor. And not to give  
9 you the terms, but rather just to put you on notice that that  
10 was going forward, we believed that there was no need for any  
11 further discovery at that point. So there was no talk of  
12 further discovery.

13 THE COURT: Mr. Wilson, I'm not asking why you didn't  
14 get discovery. I'm asking, did you get discovery from BofA  
15 about its consent to a short sale?

16 MR. WILSON: No.

17 THE COURT: Okay.

18 What discovery did -- was taken in the Colorado court?

19 MR. WILSON: Your Honor, we propounded a series of  
20 interrogatories, requests for production of documents that  
21 local counsel here provided to us. This would be approximately  
22 three years ago. And none of the information that is included  
23 in the answer from ResCap was included in any of that  
24 discovery.

25 THE COURT: Explain to me why you believe that GMAC

1 didn't have standing to foreclose.

2 MR. WILSON: Your Honor, the argument that we made to  
3 the District Court -- and I believe that it is Exhibit B, as in  
4 Boy, that was entered by ResCap, goes through the complaint  
5 that was filed against GMAC. And Your Honor, I would just draw  
6 the Court's attention to that document. It's twenty-five  
7 pages.

8 THE COURT: Okay. I've got it open.

9 MR. WILSON: Okay. Your Honor, akin to the --

10 THE COURT: But summarize for me why you believe that  
11 GMAC didn't have standing.

12 MR. WILSON: Your Honor, we believe that -- hold on,  
13 if I can refer to my notes here for a second, Your Honor.

14 THE COURT: Sure, go ahead.

15 (Pause)

16 MR. WILSON: Your Honor, we believe that the issue  
17 stems from the fraudulent conduct on the part of GMAC  
18 in -- that's stated in the first claim for relief, the breach  
19 of express contract.

20 THE COURT: Tell me -- that isn't answering my  
21 question.

22 MR. WILSON: Okay.

23 THE COURT: Tell me, in understandable words, why you  
24 believe GMAC did not have standing to foreclose.

25 MR. WILSON: In the most simple words, it's that GMAC

1 promoted the situation that created the foreclosure in the  
2 first place, because Mr. Dlin was current on all of his  
3 payments and sought to have some kind of a modification to the  
4 loan to reduce his payments and followed the direction of GMAC  
5 to the letter, exactly what GMAC said they should do. And  
6 then, GMAC increased those payments, creating a situation that  
7 was not tenable for Mr. Dlin.

8 THE COURT: Look, I've had, in other claim objections,  
9 in other adversary proceedings, there have been lots of  
10 arguments come up about GMAC's standing to foreclose. And  
11 you're not disputing that it had -- I know you say that their  
12 conduct -- the result of their -- as a result of their conduct,  
13 they should not have proceeded with foreclosure. I  
14 take -- you're not disputing that, through notes, assignments,  
15 mortgage or deed of trust, GMAC had -- could satisfy the  
16 elements of standing to foreclose under Colorado law. Am I  
17 correct about that?

18 MR. WILSON: We have not made that argument.

19 THE COURT: Okay, so what this -- and I asked this of  
20 Mr. Wishnew; let me ask it of you. I know you have a variety  
21 of causes of actions that you've alleged. But it does seem to  
22 me that there are three main theories that underlie all of your  
23 claims, what I refer to -- I think it's in the paper -- the  
24 coerced default theory, the short sale theory and the standing  
25 theory. Do you agree with that?

1 MR. WILSON: I do. I do agree with that.

2 THE COURT: Okay. And you heard my questions of Mr.  
3 Wishnew with respect to the investor guidelines. I, obviously,  
4 wasn't aware of whether you had requested them, had not  
5 requested them. But since their argument is largely premised  
6 on what the investor guidelines here provided -- let me ask  
7 you: Would you agree that if there was a set of written  
8 guidelines from HSBC, the HomeEq Service -- GMAC serviced the  
9 loan that said, in express terms, no loan modifications unless  
10 a loan is in default for at least sixty days, that you would  
11 have no cause of actions against GMAC based on the coerced  
12 default theory?

13 MR. WILSON: I would agree a hundred percent with  
14 that.

15 THE COURT: Okay.

16 MR. WILSON: If they had produced that to my client or  
17 even to us during the District Court action, then we would have  
18 withdrawn that portion because it would have been clear.

19 THE COURT: Okay.

20 MR. WILSON: I agree with you.

21 THE COURT: I'm trying to understand -- I raise my  
22 questions about what's a factual dispute, what's not a factual  
23 dispute. But I want to understand what really is at issue  
24 here. That's why -- so it's helpful to me. If there are, in  
25 fact -- there are -- that those are the investor

1 guidelines -- you're acknowledging if they accurately reported  
2 to your client what the investor guidelines were and they  
3 followed it, that theory is out, correct?

4 MR. WILSON: Yes.

5 THE COURT: Okay.

6 MR. WILSON: Yeah, I would agree with that. The  
7 question is if are those producible. We haven't seen them.  
8 Even though we requested that information, we haven't seen  
9 them.

10 THE COURT: Okay.

11 MR. WILSON: But if that were, in fact, the case,  
12 then, as Your Honor stated, yes, I believe that it would take  
13 the emphasis out of that. Agreed.

14 THE COURT: Okay. So let's focus on the short-sale  
15 theory. So does -- are you disputing your client -- is your  
16 client disputing that the second lienholders' consent was  
17 required before a short sale could take place?

18 MR. WILSON: We couldn't make that dispute, because we  
19 don't have enough information from GMAC at that point, either  
20 through the investor guidelines or from any other source, to  
21 prove that that's the case. But if we operate on the  
22 assumption that that is the case -- and just from a personal  
23 point of view, Your Honor, I know that generally to be the  
24 case, because there's a second lienholder that's in there.

25 THE COURT: Yeah, people aren't going to modify a loan

1 if there's a second lienholder behind them. I mean, I  
2 just -- I see that all the time.

3 MR. WILSON: Right. Correct. And the only point that  
4 I would add is that in my practice, Your Honor, we routinely  
5 were receiving those kinds of waivers and release of liens from  
6 Bank of America. They did that routinely. It wasn't something  
7 that was a rarity.

8 THE COURT: What do you believe you would be able to  
9 prove at -- because, look, if I understand the facts correctly  
10 here, your client came forward, used a realtor or a  
11 representative to try and arrange a short sale. There were a  
12 series of proposed sales, and GMAC's response was: not enough.  
13 It has to be eighty-five percent of the market value -- the  
14 gist. I'm not quoting from --

15 But am I correct that there had been a number of  
16 short-sale offers that GMAC rejected as being insufficient in  
17 response?

18 MR. WILSON: That's absolutely correct. There were a  
19 number of offers that were tendered. And of course, the last  
20 offer that was well above their eighty-five-percent threshold,  
21 we believe would have been the one that took hold, and that's  
22 the one just prior to the foreclosure sale.

23 THE COURT: Right. And so as to -- Mr. Wishnew, do  
24 you dispute that the last offer was above the eighty-five-  
25 percent threshold?

1 MR. WILSON: That is absolutely correct.

2 THE COURT: No, I'm asking Mr. Wishnew his --

3 MR. WILSON: Oh, I'm sorry. Apologies, Your Honor.

4 THE COURT: I'm trying to understand what the disputes  
5 are here.

6 MR. WISHNEW: It is my understanding that the last  
7 offer would have satisfied the monetary threshold.

8 THE COURT: Okay. So the issue as to the last offer  
9 was BofA consent?

10 MR. WISHNEW: Correct, Your Honor.

11 THE COURT: Do you agree with that, Mr. Wilson?

12 MR. WILSON: I do.

13 THE COURT: Okay. Let me just move to the standing  
14 theory. I mean -- and I'm not trying to -- I understand your  
15 arguments about why you think that GMAC's conduct was bad and  
16 because it was bad they couldn't foreclose. But the standing  
17 argument that I usually focus on, and I think I've looked at  
18 Colorado law of what's required for a loan servicer to go ahead  
19 and foreclose.

20 Putting aside the issue of whether there's some  
21 inequitable conduct or something that would prevent them from  
22 doing it -- I think I understand that -- you're not contesting  
23 that absent inequitable conduct or wrongful conduct, GMAC had  
24 standing to foreclose, correct?

25 MR. WILSON: That is correct. We are not making that

1 argument. You pointed out very eloquently, Your Honor, under  
2 Rule 120(d), we've afforded ourselves of the right to bring an  
3 action against GMAC in the district court, and that's the sole  
4 remedy, that's the only remedy that Mr. Dlin had.

5 THE COURT: All right. Is there anything else you  
6 want to add, Mr. Wilson? You've answered my questions.

7 MR. WILSON: No. Nothing further, Your Honor.

8 THE COURT: Mr. Wishnew?

9 MR. WISHNEW: One matter of process. Contemporaneous  
10 or --

11 THE COURT: Just pull the microphone slightly to you.

12 MR. WISHNEW: Oh, I'm sorry.

13 THE COURT: Okay, go ahead.

14 MR. WISHNEW: Mr. Dlin also had filed a motion for  
15 relief from the automatic stay to continue the --

16 THE COURT: This is not going back to Colorado.

17 MR. WISHNEW: Okay. I just want --

18 THE COURT: I'm just telling you.

19 MR. WISHNEW: -- I just want the record to be clear in  
20 that regard.

21 THE COURT: It's not -- Mr. Wilson, if this goes  
22 forward, it's going forward in my court, it's not going back to  
23 Colorado.

24 MR. WILSON: Totally understood, Your Honor.

25 THE COURT: Okay.



1 MR. WILSON: Thank you for clarifying that.

2 THE COURT: Okay.

3 MR. WISHNEW: That's it.

4 THE COURT: I think -- look, I'm going to issue an  
5 opinion or an order dealing with this. Look, Mr. Wishnew, you  
6 and Mr. Wilson ought to start talking about this now. There  
7 are disputed issues of fact here. And I'm going to permit some  
8 discovery, not blunderbuss wide-open discovery. You ought to  
9 start talking about it now. Don't even wait for me to issue an  
10 order. This is going forward.

11 It does seem to me -- and I think this last colloquy  
12 with Mr. Wilson has really been helpful to me, because the  
13 standing theory isn't the traditional standing theory that --

14 MR. WISHNEW: Right, it's not Chen and Tyler (ph.) or  
15 anything like that, Your Honor.

16 THE COURT: No, it's not. So there's really -- really  
17 there are two theories on which --

18 MR. WISHNEW: Short --

19 THE COURT: -- this is going forward.

20 MR. WISHNEW: -- short sale and coercion.

21 THE COURT: The coerced default theory and the short-  
22 sale theory.

23 MR. WISHNEW: Yeah.

24 THE COURT: Mr. Wilson, do you agree with that?

25 MR. WILSON: I do. I do agree with that, a hundred

1 percent, Your Honor.

2 THE COURT: So look, the two of you ought to talk.  
3 I'm going to issue an order, but let's get this moving along.  
4 Either settle it or figure out -- you've got to start talking  
5 about what discovery should be taken. What I'm going to wind  
6 up doing is after I issue an order, I'm going to schedule a  
7 telephone conference with the two of you. Let's get this  
8 ironed out about what discovery's going to take place, how much  
9 time is it going to take to do it, and -- you know.

10 I should tell you, Mr. Wilson, I try as best I can to  
11 schedule any evidentiary hearings pretty quickly. So this is  
12 not going to linger. Okay?

13 MR. WILSON: Very good.

14 THE COURT: All right. Thanks very much, Mr. Wilson.

15 MR. WILSON: Thank you, Your Honor.

16 THE COURT: Okay. All right.

17 MR. WILSON: Bye-bye.

18 THE COURT: One more to go, right?

19 MR. WISHNEW: Your Honor, the last matter on this  
20 morning's calendar is item 4 on page 11, the ResCap Liquidating  
21 Trust and the ResCap Borrower Claims Trust's objection to claim  
22 numbers 112, 114, 416, and 417, filed by Erlinda Abibas Aniel,  
23 Fermin Solis Aniel, and Marc Jason Aniel.

24 THE COURT: All right, is anybody appearing for the  
25 Aniels? Anybody on the telephone?

1 MR. WISHNEW: I thought I heard Erlinda Aniel  
2 register.

3 THE COURT: Yeah, Erlinda Aniel, are you on the phone?  
4 She checked in. I had the sign-up list.

5 MR. WISHNEW: Yeah, and I was pretty sure she checked  
6 in before the hearing as well, Your Honor.

7 THE COURT: Ms. Aniel are you on the telephone?

8 MS. ANIEL: Yes, Your Honor. Yes, I'm here.

9 THE COURT: All right. Mr. Wishnew will argue first,  
10 and then I will give you an opportunity to respond.

11 Go ahead, Mr. Wishnew.

12 MR. WISHNEW: Thank you, Your Honor.

13 Your Honor, as noted, the Aniels filed four general  
14 unsecured claims. They filed claims 112 and 114 asserting a  
15 10,000-dollar general unsecured claim and a 1,075,000-dollar  
16 secured claim against debtors Executive Trustee Services, and  
17 GMAC Mortgage, respectively.

18 Claim numbers 416 and 417 were filed on August 20th,  
19 2012, asserting unliquidated claims against ETS and GMAC  
20 respectively.

21 The asserted basis for liability in these claims is  
22 pending lawsuit. The claims represent the claimants' attempt  
23 to further litigate their pre-petition court actions currently  
24 stayed in California. Claims 112 and 114 relate to foreclosure  
25 on property owned by Raoul and Corazon Estiva that the

1 claimants assert a one-percent interest in, although they've  
2 never been borrow --

3 THE COURT: I thought they claimed a fifty-percent  
4 interest. One percent --

5 MR. WISHNEW: I'm sorry.

6 THE COURT: -- originally and then a fifty percent?

7 MR. WISHNEW: Your Honor, is correct, yes. Yes.

8 Even though they've never been borrowers under the  
9 loan that's being enforced by the debtors.

10 The California Superior Court previously issued a  
11 decision in that case determining the claimants lacked  
12 standings to contest the foreclosure, because they were not  
13 borrowers under the loan secured by the property. The  
14 claimants appealed the decision. The appeal is stayed. Even  
15 though res judicata does not apply here, Your Honor, the Court  
16 can still dismiss these claims because the Aniels lack --

17 THE COURT: The trial court's decision may be  
18 persuasive as to lack of standing, even if it isn't binding on  
19 me?

20 MR. WISHNEW: Exactly, Your Honor; exactly.

21 Claims number 416 and 417 are premised on the lawsuit  
22 filed in the United States District Court for the Northern  
23 District of California, also stayed due to the debtors'  
24 bankruptcy.

25 This lawsuit is an attempt to stop the foreclosure

1 sale of the property securing the Aniels' two-million-dollar  
2 loan which is serviced by the debtors, even though the Aniels  
3 have not made a payment on the loan since June 2008.

4 The Aniels' attempted to obtain a temporary  
5 restraining order to halt the foreclosure sale. The district  
6 court in California denied that application on the grounds the  
7 Aniels' lawsuit was unlikely to succeed on the merits.

8 In that decision -- again, this is persuasive not  
9 binding -- the court addressed many of the same issues  
10 addressed in the Trust's objection to these claims.

11 Notwithstanding this decision, the foreclosure sale  
12 has not been completed on this property, and it is the  
13 Borrowers' Trust's understanding that the claimants remain in  
14 the home and the loan is currently being serviced by Ocwen.

15 THE COURT: Why wasn't the foreclosure sale completed?

16 MR. WISHNEW: I believe that there were interceding  
17 bankruptcies by Mr. and Mrs. Aniel. And so in terms of  
18 starting, stopping, restarting.

19 Notwithstanding the Aniels' ability to stave off a  
20 foreclosure sale for the reasons stated in the Trust's  
21 objection in reply, their claims against GMAC Mortgage and ETS  
22 Are entirely without merit and devoid of supporting evidence.  
23 The causes of action are premised on the mistaken belief the  
24 loans at issue were transferred to the securitization trust  
25 after the closing date of the trust, and as a result, the two

1 million dollars of debt has been canceled.

2 THE COURT: So go through the facts with respect to  
3 transfers of the loan, recording the notices of default, et  
4 cetera.

5 MR. WISHNEW: Okay. This is -- and I'm referencing  
6 factual statements made in the objection filed at docket number  
7 8237 starting on page 11. On September 29, 2008, ETS,  
8 Executive Trustee Services, recorded a substitution of trustee  
9 in the San Mateo County Recorder's Office.

10 THE COURT: Hold on just a second.

11 Ms. Aniel, can you put your phone on mute? I'm  
12 picking up a lot of background noise.

13 MS. ANIEL: Okay.

14 THE COURT: Do you have it on the speaker?

15 MS. ANIEL: Yeah.

16 THE COURT: Is your phone on a speaker phone?

17 MS. ANIEL: Okay, I turn off the speaker phone. Thank  
18 you very much.

19 THE COURT: Go ahead, Mr. Wishnew.

20 MR. WISHNEW: Thank you, Your Honor. September 29th  
21 the ETS recorded a substitution of trustee in the San Mateo  
22 County Recorder's Office. A copy of the substitution of  
23 trustee is attached to the priori declaration as Exhibit X as  
24 in X-ray. On September 29, 2008, after the substitution of  
25 trustee was recorded, ETS records a notice of default as the

1 claimants were -- had not made a payment since June 17th, 2008.  
2 At that point in time, the claimants -- I'm sorry -- the  
3 debtors received inbound calls from the claimants'  
4 representative requesting a work out package for a possible  
5 loan modification.

6 Discussions continue, Your Honor. The claimants filed  
7 a Chapter 11 bankruptcy February 25th, 2009, that was converted  
8 to a Chapter 7 proceed --

9 THE COURT: All right, let me just interrupt please.  
10 I've been through the --

11 MR. WISHNEW: Yeah.

12 THE COURT: -- convoluted history and my question  
13 focuses specifically on the steps in assignments, notices,  
14 timing of those such that GMAC had standing to proceed with the  
15 foreclosure.

16 MR. WISHNEW: Okay. I guess putting aside the  
17 arguments from Gomez and those cases concerning the ability of  
18 the Aniels to challenge the standing to foreclose, with regards  
19 to --

20 THE COURT: Part of -- I mean, part of my -- as I view  
21 all these, this proof of claim, the challenge is standing,  
22 among other things. You came forward and you've put in  
23 evidence. The issue in my mind is, has the evidence that you  
24 have put in shifted the burden to the Aniels to come forward  
25 with evidence equal to or that would overcome your showing?

1 MR. WISHNEW: Correct, Your Honor.

2 THE COURT: And so my question really focuses on what  
3 have you -- what evidence have you put in to establish that  
4 GMAC had standing to foreclose?

5 MR. WISHNEW: So with regards to the standing --

6 THE COURT: I understand with respect to the Esteva  
7 (ph.) property --

8 MR. WISHNEW: Um-hum.

9 THE COURT: -- the California court's decision and  
10 your argument here is they didn't sign the note; they didn't  
11 have interest in the mortgage; they don't have standing to  
12 contest it. I'm --

13 MR. WISHNEW: That's right, Your Honor. The argument  
14 with regards to the Aniel loan is more -- in the first  
15 instance, it's really a legal argument, Your Honor, which is  
16 that in California with a nontraditional foreclosure scheme,  
17 that a borrower who is not a party to the securization trust  
18 does not have challenge to --

19 THE COURT: Doesn't actually have a challenge.

20 MR. WISHNEW: Exactly, Your Honor. So I understand  
21 Your Honor's point, but I think that in terms of their ability  
22 to challenge the standing in the first instance, it's a  
23 nonstarter from a legal standpoint.

24 THE COURT: Well, let's assume that I find that they  
25 can challenge it, I want you to go through and tell me on the



1 merits why you believe the trust has put forward evidence to  
2 shift the burden back to the Aniels.

3 MR. WISHNEW: Sure, Your Honor. So we would  
4 reference, Your Honor, paragraph 27 of the objection at docket  
5 number 8237, starting there, where we talk about the loan being  
6 transferred to HSBC Bank USA as trustee for the securization  
7 trust titled DALT2007-A05. The assignment of the Aniel deed of  
8 trust was recorded -- was subsequently recorded. And then  
9 pursuant to the pooling and servicing agreements which are  
10 probably available, though not specifically in evidence today,  
11 the GMAC Mortgage was given the authority to subservice the  
12 Aniel loan from the point it was originated until servicing  
13 transferred to Ocwen on February 16th, 2013.

14 THE COURT: Okay.

15 MR. WISHNEW: So the positive act -- so putting -- so  
16 you got the point of Gomez and numerous cases in California  
17 that follow Gomez in terms of the ability to challenge  
18 standing. The claimants fail to demonstrate by a preponderance  
19 of the evidence that the debtor -- the debtors acted improperly  
20 in servicing their loan or the alleged wrongdoing damaged them  
21 in any way.

22 What should not be forgotten, as initially mentioned,  
23 is that this loan is past due going back to June 2008, the  
24 claimants remain in their home and that the foreclosure is  
25 presently on hold. As we understand it, they are presently

1 Chapter 7 debtors.

2 THE COURT: Doesn't that open a Chapter 7 case?

3 MR. WISHNEW: That is my understanding, Your Honor.

4 So without going -- without repeating all of our arguments, we  
5 believe that for reasons discussed in the objection, the Priore  
6 declaration, and the reply, the relief sought should be granted  
7 and there sh -- and these claims should be disallowed and  
8 expunged.

9 THE COURT: When did the Chapter 7 case open?

10 MR. WISHNEW: I don't know, Your Honor. We just --

11 THE COURT: Why did the Aniels have standing to pursue  
12 a claim at all if there's a Chapter 7? Doesn't the Chapter 7  
13 trustee -- is this -- is this --

14 MR. WISHNEW: Yeah, that's a --

15 THE COURT: Let me finish my question. Did the claims  
16 they're seeking to assert here arise before the Chapter 7 case  
17 was filed?

18 MR. WISHNEW: Absolutely, Your Honor. I would just  
19 say that with regards to the Chapter 7 -- the information of  
20 the Chapter 7 is something that I learned for the first time  
21 today because we made the inquiry. We haven't dealt with this  
22 loan in a few years. We just made an inquiry of Ocwen as to  
23 the current status, and I was -- I was informed fifteen minutes  
24 before court today as to the current status. So that's why I  
25 bring it to the Court's attention.

1 THE COURT: Okay. Has anybody looked at the schedules  
2 in the Chapter 7 case to see whether the Aniels scheduled any  
3 of these asserted claims in their Chapter 7 petition or  
4 schedules?

5 MR. WISHNEW: We have not, Your Honor, but we can do  
6 that when we get back to the office today.

7 THE COURT: As you well know, I have ruled in a number  
8 of ResCap matters that estoppel applies -- judicial estoppel  
9 applies to a Chapter 7 debtor pursuing any pre-petition claims  
10 that they failed to -- not only did they failed to schedule,  
11 it's this Chapter 7 trustee who want to be the one, not the  
12 Aniels.

13 Anything else you wanted to raise today?

14 MR. WISHNEW: No. Thank you, Your Honor.

15 THE COURT: All right, Ms. Aniel, do you want  
16 to -- can you tell me, Ms. Aniel, when did you file the Chapter  
17 7 bankruptcy?

18 MS. ANIEL: Your Honor, I would like -- I would like  
19 to clarify because the data is (indiscernible). He just left  
20 off all the -- the objection. But I want --

21 THE COURT: I asked --

22 MS. ANIEL: -- to clarify --

23 THE COURT: Ms. Aniel?

24 MS. ANIEL: -- you know, because I have proof -- proof  
25 of claim.

1 THE COURT: Ms. Aniel -- Ms. Aniel --

2 MS. ANIEL: Yes.

3 THE COURT: Stop. I would appreciate it if you would  
4 answer my question. Do you have a pending Chapter 7 case?

5 MS. ANIEL: No, because already been dismissed -- not  
6 dismissed, discharge. I'm sorry.

7 THE COURT: All right. When did you file your Chapter  
8 7 case?

9 MS. ANIEL: It was converted from 11 -- it was  
10 converted to Chapter 7, that was in August 2010.

11 THE COURT: It was converted to a Chapter 7 in August  
12 2010?

13 MS. ANIEL: Yes.

14 THE COURT: And what you're saying is you received a  
15 discharge in that case --

16 MS. ANIEL: On December -- yeah. I think the  
17 discharge on Chapter 7 on December 10, 2010.

18 THE COURT: I'm sorry, 2000 what?

19 MS. ANIEL: 2010.

20 THE COURT: Mr. Wishnew, in February 2009, the Aniels  
21 filed a Chapter 11 case in the bankruptcy court in the Northern  
22 District of California. In their amended schedules in that  
23 case, they listed a fifty percent interest in the Esteva  
24 property.

25 MR. WISHNEW: Um-hum.

1 THE COURT: It was converted to a Chapter 7 case on  
2 August 4th 2010.

3 MR. WISHNEW: Yes, Your Honor.

4 THE COURT: And it received a discharge on December 2,  
5 2010.

6 MR. WISHNEW: Um-hum.

7 THE COURT: I don't know whether any claims relating  
8 to either of the transactions matters involved here were  
9 scheduled. It may be that many of the events that they're  
10 complaining about here occur in 2011/2012. So it may be that  
11 this charge doesn't affect them at all.

12 MR. WISHNEW: Your Honor, we put the Exhibit K, docket  
13 number 8237-15, is the Chapter 11 petition filed by Furman  
14 (ph.), Solace (ph.), Aniel and Perlinda Deevus Aniel (ph.).

15 THE COURT: Yes.

16 MR. WISHNEW: I just as -- as we're  
17 standing -- standing here right now, I'm just trying to confirm  
18 whether there's a claim represented on Exhibit B that might --

19 MS. ANIEL: Your Honor, the State goes in  
20 February -- I think February 2011.

21 THE COURT: Okay.

22 MS. ANIEL: That's when the trustee closed the estate,  
23 no distribution.

24 THE COURT: Okay. All right. Go ahead with your  
25 argument, Ms. Aniel. Explain to me why you think your claims

1 should not be expunged.

2 MS. ANIEL: Your Honor, during my bankruptcy Chapter  
3 11, it was already determined by the bankruptcy court here in  
4 Northern California that that property belonged to my estate,  
5 that I have fifty percent interested in that property. I  
6 claimed that in my insurance, when I filed my insurance, we  
7 were not paid the mortgage. I wanted to take care of  
8 everything. And since the beginning of when we purchased the  
9 property, I was already part of the ownership of that property.

10 So the bankruptcy court allowed that to be part of my  
11 estate. And then at the time the judge told me, you know, I'm  
12 going to file a law suit outside the bankruptcy, I have to file  
13 a motion to abandon the property at the time because there was  
14 no value in that property. That's what I did before -- before  
15 the judge told me to come back with the Chapter 7, because  
16 there is no distribution -- more -- by that time the property  
17 are no consequence of value.

18 So at the time I was -- I had -- you know, I had  
19 ownership -- a present ownership. And then after I was up  
20 there, the estate was close, I have -- I was given -- granted  
21 one percent that it is a charge. The reason for that, Your  
22 Honor, is because we went -- when we bought the property, here  
23 in California you have to pay transfer tax. And you pay, like,  
24 almost several thousand on that property tax just to buy that  
25 house. Okay, and then they told me that this was one percent

1 so that you just pay that because you cannot -- you don't pay  
2 twice on the tax here in California. That's why was Stephan  
3 just give me that one percent because Stephan knew that I  
4 already disclosed that, that I have to keep up my interest on  
5 the property. And then --

6 THE COURT: You didn't have any writing that  
7 established a fifty percent. The only -- anything in writing  
8 was a one percent. You asserted a fifty percent interest, but  
9 you don't have any documents to support it, correct?

10 MS. ANIEL: No, but it supports on my 1014 -- 40  
11 income tax since we bought the property, because these are my  
12 IRS.

13 THE COURT: Yeah, but there's no --

14 MS. ANIEL: No, we -- we --

15 THE COURT: There's no bill of sale or -- or document  
16 sub -- you know, transferred sub -- the owner of the property  
17 transferring fifty percent to you, is there?

18 MS. ANIEL: I guess not, no, Your Honor. Just like  
19 because it's a friend, we just, you know, talked -- we just,  
20 you know, agreed upon. And unfortunately, Mr. Esteva is  
21 already deceased.

22 THE COURT: I see. And -- you think --

23 MS. ANIEL: Yeah.

24 THE COURT: You think under California law you can  
25 transfer fifty percent interest in property without anything in

1 writing?

2 MS. ANIEL: At the time, I -- I -- I really -- I don't  
3 anticipate that. But I -- you know, it's all about disclosure.  
4 When I filed my Chapter 11, it was disclosed that I have the  
5 fifty percent interest on the property and Esteva didn't  
6 contest that.

7 THE COURT: Why did somebody have to contest it? You  
8 don't have a piece of paper that says that somebody transferred  
9 at fifty percent interest in this property to you. You assert  
10 it, but you don't have anything to back it up.

11 MS. ANIEL: No, only the taxes that I -- that I paid.  
12 Only the taxes, only the mortgage payment that I used my, you  
13 know, account number to pay.

14 THE COURT: Okay.

15 MS. ANIEL: The monthly mortgage, the taxes, the  
16 insurance. That's how our arrangement was at the time without,  
17 you know -- just all about the trust, we just trust each other.

18 THE COURT: Okay, anything else you wanted to add?

19 MS. ANIEL: And we agreed upon -- before buying the  
20 property, we agreed that it -- we would share fifty percent,  
21 that I made also a down payment for that.

22 THE COURT: You didn't make any mortgage payments  
23 though, did you?

24 MS. ANIEL: I did, Your Honor, I did. I did, I was  
25 making all these mortgage payments. I was the one collecting



1 the rent, I was the one everything. If there was repairs in  
2 the house I was -- the tenant would call me and then, you know,  
3 I would do the repair.

4 THE COURT: When did you stop paying the mortgage?

5 MS. ANIEL: When? I don't -- I don't -- I don't  
6 remember at the time because there was -- at the time they  
7 would always tell you, you know, you cannot -- you cannot offer  
8 loan modification if you are not in the front. You have to be  
9 in front for ninety days in order for -- for them to -- I have  
10 to create timesheet in order for them to -- to modify the loan.

11 THE COURT: This was an income property, not a  
12 residential property, correct?

13 MS. ANIEL: No, no, no. It's an income property, yes.

14 THE COURT: All right, anything else you want to add?

15 MS. ANIEL: This is what I did for the property. I  
16 think -- oh, this (indiscernible) was dismissed by the lower  
17 court here in San Mateo, and I filed an appeal --

18 THE COURT: Yes.

19 MS. ANIEL: -- standing in California Court of Appeal  
20 because of the debtor's bankruptcy.

21 THE COURT: Yes, I understand that. Okay, anything  
22 else?

23 MS. ANIEL: Anything else? Regarding the assignment,  
24 we did that was done (indiscernible). I -- I disputed that  
25 because, based on the assignment that we did I -- you know, I

1 accuse -- there's an allegation that (indiscernible), I'm not  
2 the signer. We (indiscernible) that he only sign it without  
3 his personal knowledge. He said that.

4 THE COURT: Did he ever say that he --

5 MS. ANIEL: (Indiscernible).

6 THE COURT: Do you have some evidence that he said  
7 that the assignment in your case is somehow fraudulent?

8 MS. ANIEL: There was the deposition -- there was the  
9 deposition of Jeffrey Stephan that I attached --

10 THE COURT: Yes, I know, but that --

11 MS. ANIEL: -- to my proof of claim.

12 THE COURT: -- doesn't involve your case. That  
13 doesn't involve -- he acknowledged that he signed certain other  
14 documents, not yours.

15 MS. ANIEL: Yeah, but he -- he admitted that he signed  
16 10,000 every month, so I assumed that one of those assignments  
17 was our -- was -- was on the property at (indiscernible). And  
18 also, the notary -- notary said, you know, it was notarized in  
19 Pennsylvania, but it was under penalty of perjury under the  
20 State of California. So how would -- how would they justify  
21 that? Why is it it was notarized in Pennsylvania and then it  
22 was under penalty -- it was signed under penalty by Calif -- in  
23 the State of California?

24 THE COURT: All right.

25 MS. ANIEL: So if we have to assume that,

1 that's -- that assignment is void. And also that the time when  
2 it was transferred, I was already in bankruptcy, that is a  
3 violation of automatic stay.

4 THE COURT: All right, thank you.

5 MS. ANIEL: And it's unreliable documents, Your Honor.  
6 And can we discuss, also, on the property on -- how do you call  
7 that -- 416, 417 proof of claim, Your Honor, if you are done  
8 with proof 112 and 114?

9 THE COURT: Go ahead. I'm going to give you a -- I --

10 MS. ANIEL: Oh, okay, okay, okay, okay, okay. And I  
11 also -- I -- on my allegation, in my complaint, I said I have  
12 no debt on this property, and if you -- I will give the -- I  
13 call the attention of the -- of the Court, and especially,  
14 Judge, that's Exhibit A that they submitted in the court, I  
15 want you to make that as a judicial notice, and it says power  
16 of attorney, that they were given power of attorney by HSB  
17 (sic) Bank. It's not true, not like an agent as trustee.

18 We just signed affidavit that was done, dated June 11,  
19 2013, and we attached on that affidavit a limited power of  
20 attorney, and least of all, the trustee. But unfortunately,  
21 the trustee, HSB, as trustee for .200708-3 and 08-5, is not  
22 listed on this -- on this -- how do you call that -- limited  
23 power of attorney. It was not listed. This is -- this is  
24 the -- you know, if they just read it, because Kathy Priore  
25 says on her declaration -- supplemental declaration that she

1 reads the books and the records of the debtor, but it  
2 doesn't -- it contradicts the records of the -- the books and  
3 records of the debtor. It doesn't say here that the trustee,  
4 that they would give him limited power of attorney to sign in  
5 the (indiscernible). And also, it was dated June 11, 2013.  
6 This is prior of giving the authority to -- dedicated the date,  
7 and there was no (indiscernible) to hear that they were -- that  
8 they were given an authority, so an assignment of deed is void,  
9 Your Honor.

10 And then, if we go on Exhibit B, go page 3 of 264,  
11 this is based on the declaration of Ms. Kathy Priore under  
12 penalty of perjury, it says that I don't owe any money. It  
13 says there that there are three accounts that have been listed  
14 here. It says, carried balance, principal, zero; escrow, zero;  
15 and applied balance, zero; buy-down, zero. And it says it's  
16 part of a collections property, it says, paid off. My loan has  
17 been already paid off since the beginning of my -- of my -- of  
18 my case, Your Honor, but they still -- you know, they offered  
19 my note, they sold it to -- and it says an investor,  
20 (indiscernible) was (indiscernible).

21 THE COURT: All right, Ms. Aniel --

22 MS. ANIEL: As it searched --

23 THE COURT: Ms. Aniel, thank you.

24 MS. ANIEL: Doesn't say HSB --

25 THE COURT: Ms. Aniel --

1 MS. ANIEL: -- as trustee for (indiscernible) -- yes.

2 THE COURT: Writing off the balance on a defaulted  
3 note is not the same thing as having paid it off.

4 Let me ask -- I have some questions for Mr. Wishnew.  
5 Mr. Wishnew --

6 MS. ANIEL: Your Honor, I received --

7 THE COURT: No. Stop.

8 MS. ANIEL: -- 1098 --

9 THE COURT: Ms. Aniel --

10 MS. ANIEL: -- interest mortgage payment that it was  
11 already paid off --

12 THE COURT: Ms. Aniel --

13 MS. ANIEL: -- on 2013, Your Honor.

14 THE COURT: Ms. Aniel --

15 MS. ANIEL: That's --

16 THE COURT: -- stop now.

17 MS. ANIEL: Yes.

18 THE COURT: Stop.

19 MS. ANIEL: Yes, yes.

20 THE COURT: No more.

21 MS. ANIEL: Yes.

22 THE COURT: Mr. Wishnew, is there a limited power of  
23 attorney executed prior to the time that the assignment was  
24 executed? What Ms. Aniel has pointed to is a discrepancy in  
25 the date, that the limited power of attorney included in the

1 record from 2013 well post-dates the time when the assignment  
2 that's at issue here was executed.

3 MR. WISHNEW: I just -- I'd like to look this  
4 doc -- what specific exhibits is she referring to, Your Honor?

5 THE COURT: She referred to a limited power of  
6 attorney dated in 2013, and what was the authority for  
7 the -- if it wasn't executed -- if the limited power of  
8 attorney wasn't granted until 2013, what was the authority to  
9 execute assignments prior to that time?

10 MR. WISHNEW: One moment, Your Honor.

11 (Pause)

12 MR. WISHNEW: Your Honor, just what's giving me pause  
13 here is the date, here. June 11th, 2013 was after our  
14 servicing platform sale to Ocwen, so --

15 THE COURT: Yes? That's the point.

16 MR. WISHNEW: I understand, Your Honor. I understand.  
17 To the extent that it was -- to the extent Ocwen was servicing  
18 this loan and it was not taken out of -- and continuing to  
19 service in GMAC Mortgage's name and was not taken out of GMAC  
20 Mortgage's name --

21 THE COURT: What I'm really interested in is, was  
22 there authority to execute the assignment at the time that it  
23 was originally done?

24 MR. WISHNEW: At the time it was originally done, it  
25 would have been done pursuant to the pooling and servicing

1 agreement into which the loan was deposited.

2 THE COURT: And you say that gave the specific  
3 authority to do that?

4 MR. WISHNEW: Typically, yes, Your Honor.

5 THE COURT: All right, I'm going to take the matter  
6 under submission.

7 MR. WISHNEW: Thank you, Your Honor.

8 THE COURT: All right, does that conclude the agenda?

9 MR. WISHNEW: That concludes this morning's agenda.

10 THE COURT: All right. We're in recess.

11 Thank you, Ms. Aniel.

12 MS. ANIEL: Thank you, Your Honor. I hope you, you  
13 know --

14 THE COURT: Yeah, I'm going to --

15 MS. ANIEL: -- be fair, because even -- may I say  
16 something?

17 THE COURT: No, we got --

18 MS. ANIEL: You just look at the --

19 THE COURT: Ms. Aniel, I was just thanking you.

20 MS. ANIEL: Yes.

21 THE COURT: We're not -- no further argument, okay?

22 MS. ANIEL: Okay. Thank you very much, Your Honor.

23 THE COURT: All right, okay.

24 MS. ANIEL: Have a nice day. Thank you. Bye-bye.

25 THE COURT: You're going to be back at 2 o'clock? Is

1 that --

2 MR. WISHNEW: Yes, Your Honor.

3 THE COURT: Did you --

4 MR. WISHNEW: We'll be short, very short.

5 THE COURT: Okay.

6 (Whereupon, the proceedings were concluded at 12:32 PM)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript is a true  
and accurate record of the proceedings.



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DAVID RUTT

AAERT Certified Electronic Transcriber CET\*\*D 635

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Date: April 16, 2015